UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II
290 BROADWAY
NEW YORK, NEW YORK 10007-1866

JUL 30 2014

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

7005 3110 0000 5947 3139

7005 3110 0000 5947 3146

Theodore Fiore, President
T. Fiore Demolition
411 Wilson Ave
Newark, NJ 07105

Re: **COMPLAINT AND NOTICE OF OPPORTUNITY TO REQUEST A HEARING**
In the matter of: Brick Township and T. Fioro Recycling, Inc.
Docket No. CAA-02-2014-1221

Dear Mr.Fiori:

Enclosed is a copy of the above-referenced Complaint and Notice of Opportunity to Request a Hearing (Complaint) issued to Brick Township and T. Fioro Demolition, pursuant to Section 113(d) of the Clean Air Act, 42 U.S.C. §§ 7401 et seq. (the Act), § 7413(d). The Complaint alleges violations of 40 C.F.R. Part 61, Subpart M (Asbestos NESHAP), promulgated pursuant to Section 112 and 114 of the Act. The total amount of the penalty proposed is $102,605.

Pursuant to the Consolidated Rules of Practice, 40 C.F.R. Part 22, and as stated in the section of the Complaint entitled, "Notice of Opportunity to Request a Hearing," if you wish to contest any of the allegations of the Complaint or the amount of the proposed penalty, you must file a written answer to the Complaint within thirty (30) days of receipt, as established by the Certified Mail Return Receipt, or you may lose the opportunity for a hearing and EPA may file a motion for default judgment. If the motion is granted, the penalty proposed in the Complaint will become due and payable thirty (30) days after the effective date of a Final Order. A copy of the Consolidated Rules of Practice is

enclosed for reference.

Counsel designated to appear on behalf of the Complainant in this matter is John F. Dolinar, who can be reached at (212) 637-3204 or by mail at the address listed below.

As stated in the section of the Complaint entitled "Settlement Conference," EPA is prepared to begin to pursue settlement of this matter immediately.

I encourage you or your attorney, if you are represented, to contact EPA counsel.

Sincerely,

Dore LaPosta, Director
Division of Enforcement and
Compliance Assistance

Enclosures: COMPLAINT AND NOTICE OF OPPORTUNITY FOR HEARING

40 C.F.R. Part 22, Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits.

Clean Air Act Stationary Source Civil Penalty Policy

Clean Air Act Penalty Policy, Appendix III, Asbestos Demolition and Renovation Civil Penalty Policy (Rev. May 5, 1990)

cc: Regional Hearing Clerk (With: Original Complaint with Certificate of Service and one copy of Complaint with Certificate of Service):

Karen Maples
Regional Hearing Clerk
United States Environmental Protection Agency, Region 2
290 Broadway – 16th Floor
New York, NY 10007-1866

Juan Carlos Bellu
Deputy Department Head
Township of Brick
401 Charles Bridge Road
Brick, New Jersey 08723

Counsel on behalf of EPA:

John F. Dolinar
Assistant Regional Counsel
Office of Regional Counsel
United States Environmental Protection Agency, Region 2
290 Broadway – 16th Floor
New York, NY 10007-1866

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II
290 BROADWAY
NEW YORK, NEW YORK 10007-1866

JUL 30 2014

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Juan Carlos Bellu
Deputy Department Head
Township of Brick
401 Charles Bridge Road
Brick, New Jersey 08723

Re: **COMPLAINT AND NOTICE OF OPPORTUNITY TO REQUEST A HEARING**
In the matter of: Brick Township and T. Fioro Recycling, Inc.
Docket No. CAA-02-2014-1221

Dear Mr. Bellu:

Enclosed is a copy of the above-referenced Complaint and Notice of Opportunity to Request a Hearing (Complaint) issued to Brick Township and T. Fioro Demolition, pursuant to Section 113(d) of the Clean Air Act, 42 U.S.C. §§ 7401 et seq. (the Act), § 7413(d). The Complaint alleges violations of 40 C.F.R. Part 61, Subpart M (Asbestos NESHAP), promulgated pursuant to Section 112 and 114 of the Act. The total amount of the penalty proposed is $102,605.

Pursuant to the Consolidated Rules of Practice, 40 C.F.R. Part 22, and as stated in the section of the Complaint entitled, "Notice of Opportunity to Request a Hearing," if you wish to contest any of the allegations of the Complaint or the amount of the proposed penalty, you must file a written answer to the Complaint within thirty (30) days of receipt, as established by the Certified Mail Return Receipt, or you may lose the opportunity for a hearing and EPA may file a motion for default judgment. If the motion is granted, the penalty proposed in the Complaint will become due and payable thirty (30) days after the effective date of a Final Order. A copy of the Consolidated Rules of Practice is

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As stated in the section of the Complaint entitled "Settlement Conference," EPA is prepared to begin to pursue settlement of this matter immediately.

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Sincerely,

Dore LaPosta, Director
Division of Enforcement and
Compliance Assistance

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Karen Maples
Regional Hearing Clerk
United States Environmental Protection Agency, Region 2
290 Broadway – 16th Floor
New York, NY 10007-1866

Theodore Fiore, President
T. Fiore Demolition
411 Wilson Ave
Newark, NJ 07105

Counsel on behalf of EPA:

John F. Dolinar
Assistant Regional Counsel
Office of Regional Counsel
United States Environmental Protection Agency, Region 2
290 Broadway – 16th Floor
New York, NY 10007-1866

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

In re: Township of Brick, New Jersey & T. Fiore Recycling, Inc. Respondents In a proceeding under Section 113(d) of the Clean Air Act	**COMPLAINT** **and** **NOTICE OF OPPORTUNITY TO REQUEST A HEARING** CAA-02-2014-1221

PRELIMINARY STATEMENT

In this Complaint and Notice of Opportunity to Request a Hearing ("Complaint"), the United States Environmental Protection Agency ("EPA") alleges that the Township of Brick, New Jersey ("Brick Township") and T. Fiore Recycling, Inc. ("T. Fiore") ("Respondents") violated 40 C.F.R. § 61.145(c) by failing to ensure that at least one person who is certified or trained in accordance with 40 C.F.R. § 61.145(c)(8) was onsite to supervise the demolition operations of nine (9) separate houses that were all located within the Township of Brick, New Jersey. These include 518 Rt. 35 N, 515 Sunset Blvd, 519 Sunset Blvd, 112 Jeanett Blvd, 7 West Marion, 9 West Marion, 11 West Marion, 15 West Marion and 473 Rt. 35 N. Additionally, Respondents violated 40 C.F.R. § 61.150(b)(1) by failing to dispose of the debris from at least four (4) of these houses (518 Rt. 35 N, 515 Sunset Blvd, 519 Sunset Blvd, and 112 Jeanett Blvd) in a landfill certified to accept and handle asbestos-containing waste material (ACWM).

Finally, Respondents violated 40 C.F.R. § 61.145(c)(6) by failing to ensure that debris was kept adequately wet at the 473 Rt. 35 N site during the demolition process which resulted in visible emissions. The Complaint proposes a civil penalty of $102,605 for the Respondents' violations and is brought pursuant to Section 113(d) of the Act, 42 U.S.C. § 7413(d), and EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 (the "Consolidated Rules of Practice"). A copy of the Consolidated Rules of Practice is enclosed with the service copy of this Complaint.

LEGAL BACKGROUND

A. EPA's Authority to Enforce the CAA and its Implementing Regulations

1. Section 113(d)(1) of the CAA authorizes the EPA Administrator to issue an order assessing civil administrative penalties against any person that has violated or is violating any requirement or prohibition of subchapters I, III, IV-A, V or VI of the Act, or any requirement or prohibition of any rule, order, waiver, permit or plan promulgated pursuant to any of those subchapters, including but not limited to any regulation promulgated pursuant to 40 C.F.R. Part 61, Subpart M of the Act.

2. Section 302(e) of the CAA provides that whenever the term "person" is used in the Act, the term includes an individual, corporation, partnership, association, state, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

3. Section 113(d)(2)(A) of the CAA provides that any administrative penalty assessed under Section 113(d)(1) of the CAA shall be assessed only after notice and an opportunity for a hearing, and that the EPA Administrator shall promulgate rules for such hearings. The Consolidated Rules of Practice contain those rules and apply to this Complaint.

4. Pursuant to EPA Delegation of Authority 7-6-A and EPA Region 2 Delegation of Authority 7-6-A, the Administrator has delegated to the Complainant, the Director of the Division of Enforcement and Compliance Assistance, through the Region 2, Regional Administrator, the authority to (a) make findings of violations, (b) issue CAA Section 113(d) administrative penalty complaints, and (c) agree to settlements and sign consent agreements memorializing those settlements, for CAA violations that occur in the State of New York, the State of New Jersey, the Commonwealth of Puerto Rico, and the Territory of the U.S. Virgin Islands.

B. **National Emissions Standards for Hazardous Air Pollutants – 40 C.F.R. Part 61, Subpart M**

5. Section 112 of the Act requires the EPA Administrator to: (i) publish a list of hazardous air pollutants ("HAPs"), (ii) publish a list of categories and subcategories of major and area sources of those HAPs, and (iii) promulgate regulations establishing emission standards for each such category and subcategory.

6. 40 C.F.R. § 61.141 defines "asbestos-containing waste material" (ACWM) as friable asbestos waste material, filters from control devices, bags or other similar packaging contaminated with commercial asbestos, regulated ACWM and materials contaminated with asbestos including disposable equipment and clothing.

7. 40 C.F.R. § 61.141 defines "regulated asbestos-containing material" (RACM) as (a) Friable asbestos material, (b) Category I nonfriable asbestos-containing material (ACM) that has become friable, (c) Category I nonfriable ACM that will be or has been subjected to sanding, grinding, cutting, or abrading, or (d) Category II nonfriable ACM that has a high probability of becoming or has become crumbled, pulverized, or reduced to powder by the forces expected to act on the material in the course of demolition or renovation operations regulated by this subpart.

8. 40 C.F.R. § 61.141 defines "demolition" to include an operation in which load supporting structural members are wrecked or taken out.

9. 40 C.F.R. § 61.141 defines "facility" as any institutional, commercial, public, industrial, or residential structure, installation, or building (including any structure, installation, or building containing condominiums or individual dwelling units operated as a residential cooperative, but excluding residential buildings having four or fewer dwelling units); any ship; and any active or inactive waste disposal site.

10. 40 C.F.R. § 61.141 defines "installation" as any building or structure or any group of buildings or structures at a single demolition or renovation site that are under the control of the same owner or operator (or owner or operator under common control).

11. 40 C.F.R. § 61.141 defines an "owner or operator of a demolition or renovation activity" as any person who owns, leases, operates, controls or supervises the facility being renovated or any person who owns, leases, operates, controls or supervises the demolition or renovation operations, or both.

12. 40 C.F.R. § 61.141 defines "working days" as Monday through Friday.

13. 40 C.F.R. § 61.145(a)(1)(i) and (ii) and 40 C.F.R. § 61.145(a)(4)(i) and (ii) provide that the requirements of 40 C.F.R. § 61.145(b) and (c) apply to the owners and operators of renovation or demolition activities in which the amount of RACM that is stripped, removed, dislodged, cut, drilled or similarly disturbed is at least 80 linear meters (260 linear feet) on pipes or at least 15 square meters (160 square feet) on other facility components or at least 1 cubic meter (35 cubic feet) off facility components where the length or area could not be measured previously.

14. 40 C.F.R § 61.145(c)(8) requires that no RACM shall be stripped, removed, or otherwise handled or disturbed at a facility regulated by this section unless at least one onsite representative, such as a foreman or management-level person or other authorized representative, trained in the provisions of this regulation and the means of complying with them, is present.

15. 40 C.F.R. § 61.145(c)(6) requires that all RACM, including material that has been removed or stripped to be adequately wet until collected and contained or treated in preparation for disposal in accordance with § 61.150.

16. 40 C.F.R. § 61.150(b)(1) requires that all asbestos-containing waste material shall be deposited as soon as is practical by the waste generator at a waste disposal site operated in accordance with the provisions of § 61.154.

FINDINGS OF FACT

17. The factual findings set forth below are based on an investigation conducted by EPA Region 2 personnel pursuant to Section 114 of the CAA.

18. Brick Township is the owner of affected demolition or renovation activities, as defined by 40 C.F.R. §§ 61.141 and 61.145(b).

19. T. Fiore is the operator of affected demolition or renovation activities, as defined by 40 C.F.R. §§ 61.141 and 61.145(b).

20. The affected demolition and renovation activities occurred at any building or structure or any group of buildings or structures at a single demolition or renovation site that are under the control of the same owner or operator (or owner or operator under common control). (See definition of "installation" at40 C.F.R. § 61.141.)

21. On July 30, 2013, an EPA Inspector inspected the demolition site at 112 Jeanett Drive in Brick Township.

22. At the time of the July 30, 2013 inspection, it was discovered that demolition debris from the demolition of four houses (518 Rt. 35 N, 515 Sunset Blvd, 519 Sunset Blvd and 112 Jeanett Blvd) that were declared "unsafe to enter" for purposes of inspection and abatement was not sent to a landfill certified to accept asbestos-containing waste material.

23. At the time of the July 30, 2013 inspection, for the demolition of at least four (4) houses (518 Rt. 35 N, 515 Sunset Blvd, 519 Sunset Blvd and 112 Jeanett Blvd), it was discovered there was no person trained onsite to supervise the demolition and debris removal operation, as required by 40 C.F.R. § 61.145(c)(8).

24. On September 4, 2013, an EPA Inspector inspected the demolition site at 473 Rt 35 N in Brick Township.

25. At the time of the September 4, 2013 inspection, for the demolition of at least five (5) houses (7 West Marion, 9 West Marion, 11 West Marion, 15 West Marion and 473 Rt. 35 N), it was discovered there was no person trained onsite to supervise the demolition and debris removal operation, as required by 40 C.F.R. § 61.145(c)(8).

26. At the time of the September 4, 2013 inspection, Mr. Benny Fussella, a T. Fiore supervisor at the site, confirmed that no T. Fiore personnel at the site were asbestos supervisor-certified as required by 40 C.F.R. § 61.145(c)(8).

27. At the time of the September 4, 2013 inspection, Mr. Benny Fussella, a T. Fiore supervisor at the site, requested to know where he and his staff could obtain such certification.

28. The EPA Inspector observed visible emissions on two (2) separate occasions during the inspection of the demolition site located at 473 Rt. 35 N. The first observation was at approximately 10:00 am when the excavator was shifting the demolition debris without any water being used to keep the debris wet. The EPA inspector noted that the hose was not connected to the water hydrant at the time. The second observation was at approximately 12:00

pm when the excavator was transferring the demolition debris into a dumpster. Although water was being used, T. Fiore failed to adequately wet the debris prior to handling and transferring the debris which resulted in visible emissions.

CONCLUSIONS OF LAW

Based on the Findings of Fact set forth above, EPA reaches the following conclusions of law:

29. Respondents are "persons" within the meaning of Section 302(e) of the Act.

30. Respondents are subject to 40 C.F.R Part, 61 Subpart M, the Asbestos NESHAP regulation.

31. The affected demolition and renovation activities occurred at an "installation" as defined at 40 C.F.R. § 61.141.

32. Because 40 C.F.R. § 61.141 defines "facility" to include an "installation" the affected demolition and renovation activities occurred at a "facility."

Count 1:

Failure to dispose of asbestos containing waste material in a certified/licensed asbestos landfill

33. Paragraphs 17 to 28 above are incorporated herein by reference.

34. Respondents' failure to dispose of debris from at least four houses (518 Rt. 35 N, 515 Sunset Blvd, 519 Sunset Blvd, and 112 Jeanett Blvd) that were "unsafe to enter" for purposes of inspection and abatement in a landfill that is certified/licensed to accept ACWM is a violation of Section 112 of the Act and 40 C.F.R. § 61.150(b)(1) of the Asbestos NESHAP.

Count 2:

Failure to Have a Asbestos-certified Supervisor Onsite

35. Paragraphs 17 to 28 above are incorporated herein by reference.

36. Respondents' failure to ensure that at least one person certified or trained in accordance with 40 C.F.R. § 61.145(c)(8) is onsite to supervise the demolition operation at the nine demolition sites (518 Rt. 35 N, 515 Sunset Blvd, 519 Sunset Blvd, 112 Jeanett Blvd, 7 West Marion, 9 West Marion, 11 West Marion, 15 West Marion and 473 Rt. 35 N) is a violation of Section 112 of the Act and 40 C.F.R. § 61.145(c)(8) of the Asbestos NESHAP.

Count 3:

Failure to Follow Procedures for Asbestos Emissions Control

37. Paragraphs 17 to 28 above are incorporated herein by reference.

38. Respondents' failure to ensure that debris was kept adequately wet at the 473 Rt. 35 N demolition site resulting in visible emissions is a violation a violation of Section 112 of the Act and 40 C.F.R. § 61.145(c)(6) of the Asbestos NESHAP.

PROPOSED CIVIL PENALTY

Based on the statutory penalty assessment criteria set forth in CAA Section 113(e), and on the guidance provided by EPA's Clean Air Act Stationary Source Civil Penalty Policy (the "CAA Penalty Policy"), the Complainant proposes a civil penalty of $ 102,605 for Respondents' violations.

A. Statutory Penalty Assessment Criteria

Section 113(d) of the CAA provides that the Administrator may assess a civil administrative penalty of up to $25,000 per day for each violation of the Act, including but not limited to violations of any requirements or prohibitions of rules promulgated under the Act. However, the statutory maximum of $25,000 per day has been adjusted upward to account for inflation, pursuant to the Debt Collection Improvement Act of 1996 ("DCIA"). Thus, the statutory maximum is $27,500 for violations that occurred after January 30, 1997 through March 15, 2004, $32,500 for violations that occurred after March 15, 2004 through January 12, 2009

and $37,500 for violations that occurred after January 12, 2009. *See* 40 C.F.R. Part 19, Table 1. Part 19 indicates that the maximum civil penalty has been upwardly adjusted 10% for violations that occurred after January 30, 1997 through March 15, 2004, further adjusted 17.23% for violations that occurred after March 15, 2004 through January 12, 2009, for a total of 28.95%, and further adjusted an additional 9.83% for violations that occurred after January 12, 2009, for a total of 41.63%.

In determining the amount of penalty to be assessed, Section 113(e) of the CAA requires that the Administrator consider the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence, the payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation and other factors as justice may require.

B. CAA Penalty Policy

EPA's CAA Penalty Policy reflects EPA's application of the factors set forth in Section 113(e) of the Act and provides guidance on how EPA is to calculate penalties for CAA. The policy indicates that EPA should propose a penalty consisting of an economic benefit component and a gravity component. The economic benefit component is the economic benefit the violator gained as a result of the violation. The gravity component, in turn, consists of elements based on the actual or potential harm caused by the violation, the significance of the regulation in question to the regulatory scheme, the sensitivity of the environment and the size of the violator. Finally, consistent with the DCIA and 40 C.F.R. Part 19, when proposing a penalty for a specific violation, EPA adjusts the dollar figures listed in the CAA Penalty Policy, upward for inflation.

C. EPA's Proposed Penalty in this Case

The Administrator must consider the factors specified in Section 113(e) of the Act when assessing an administrative penalty under Section 113(d). Based upon an evaluation of the facts alleged in this complaint and the factors in Section 113(e) of the Act, Complainant proposes that the Administrator assess a civil penalty against Respondent of $102,605. Complainant evaluated the facts and circumstances of this case with specific reference to EPA's CAA Penalty Policy. Enclosed with this complaint is a copy of the policy. Complainant developed the proposed penalty based on the best information available to Complainant at this time. Complainant may adjust the proposed penalty if the Respondent establishes bona fide issues of ability to pay or other defenses relevant to the penalty's appropriateness.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

You have a right to request a hearing: (1) to contest any material facts set forth in the Complaint; (2) to contend that the amount of the penalty proposed in the Complaint is inappropriate; or (3) to seek a judgment with respect to the law applicable to this matter. The hearing is subject to the Administrative Procedure Act, 5 U.S.C. §§ 552 *et seq.*, and the procedures set forth in EPA's Consolidated Rules of Practice.

In order to request a hearing you must file a written Answer to this Complaint along with the request for a hearing with the EPA Regional Hearing Clerk within thirty (30) days of your receipt of this Complaint. The Answer and request for a hearing must be filed at the following address:

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency - Region 2
290 Broadway - 16th Floor
New York, New York 10007-1866

A copy of the Answer and the request for a hearing, as well as copies of all other papers filed in this matter, are to be served on EPA to the attention of EPA counsel at the following address:

John F. Dolinar
Assistant Regional Counsel
Office of Regional Counsel, Air Branch
U.S. Environmental Protection Agency - Region 2
290 Broadway - 16th Floor
New York, New York 10007-1866

Your Answer should, clearly and directly, admit, deny, or explain each factual allegation contained in this Complaint with regard to which you have any knowledge. If you have no knowledge of a particular factual allegation of the Complaint, you must so state and the allegation will be deemed to be denied.

The Answer shall also state: (1) the circumstances or arguments which you allege constitute the grounds of a defense; (2) whether a hearing is requested; and (3) a concise statement of the facts which you intend to place at issue in the hearing.

If you fail to serve and file an Answer to this Complaint within thirty (30) days of receipt, Complainant may file a motion for default. A finding of default constitutes an admission of the facts alleged in the Complaint and a waiver of your right to a hearing. The total proposed penalty becomes due and payable without further proceedings thirty (30) days after the issue date of a Default Order.

NOTICE OF OPPORTUNITY FOR A SETTLEMENT CONFERENCE

EPA encourages all parties against whom the assessment of civil penalties is proposed to pursue the possibility of settlement by engaging in informal settlement communications with EPA counsel. However, conferring informally with EPA in pursuit of settlement does not extend the time allowed to answer the Complaint and to request a hearing. Those times are set by the Consolidated Rules of Practice.

You may contact EPA counsel at the address listed above to discuss settlement, the alleged violations and/or the amount of the proposed penalty, whether or not you intend to file an Answer and/or request a hearing. If you are represented by legal counsel, your counsel should contact EPA. If a settlement is reached, it will be in the form of a written Consent Agreement and accompanying Final Order.

PAYMENT OF PENALTY IN LIEU OF ANSWER, HEARING AND/OR SETTLEMENT

Instead of filing an Answer, requesting a hearing, and/or requesting an informal settlement conference, you may choose to pay the full amount of the penalty proposed in the Complaint. Such payment should be made by a cashier's or certified check payable to the Treasurer, United States of America, marked with the docket number and the name of the Respondent(s) which appear on the first page of this Complaint. The check must be mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St Louis, MO 63197-9000

A copy of your letter transmitting the check and a copy of the check must be sent simultaneously to EPA counsel assigned to this case at the address provided under the section of

this Complaint entitled Notice of Opportunity to Request a Hearing. Payment of the proposed penalty in this fashion does not relieve one of responsibility to comply with any and all requirements of the Clean Air Act.

Dated: JULY 30, 2014

Dore F. LaPosta, Director
Division of Enforcement and
Compliance Assistance

To: Theodore Fiore, President
T. Fiore Demolition
411 Wilson Ave
Newark, NJ 07105

Juan Carlos Bellu
Deputy Department Head
Township of Brick
401 Chambers Bridge Road
Brick, NJ 08723

(h) The Regional Administrator may clude in any statement a date of ex- ration, after which date the approval the Regional Administrator con- ined in the statement shall no longer ply. The date of expiration shall not come effective if the applicant has bmitted the statement to the SBA, lor to the date of expiration, as part the application for financial assist- ice.

1.11 Public participation.

(a) Applications shall not generally subject to public notice, public com- ent, or public hearings. Applications ring the period of review as stated in 1.5, or during the period of appeal as ovided in §21.8, shall be available for iblic inspection. Approved applica- ons as provided in §21.10(d) shall be ailable for public inspection at all mes during the five year period.

(b) The Regional Administrator, if he lieves that the addition, alteration, method of operation may adversely id significantly affect an interest of ie public, shall provide for a public otice and/or public hearing on the ap- lication. The public notice and/or pub- c hearing shall be conducted in ac- ordance with the procedures specified ir a permit under 40 CFR 125.32 and 5.34(b).

(c) Where the applicant is able to emonstrate to the satisfaction of the egional Administrator that disclosure f certain information or parts thereof s provided in §21.3(c)(5) would result i the divulging of methods or proc- sses entitled to protection as trade se- rets, the Regional Administrator shall eat the information or the particular art as confidential in accordance with he purposes of section 1905 of Title 18 f the United States Code and not re- ease it to any unauthorized person. *rovided, however,* That if access to uch information is subsequently re- uested by any person, there will be ompliance with the procedures specified in 40 CFR part 2. Such information ay be disclosed to other officers, em- loyees, or authorized representatives f the United States concerned with arrying out the Act or when relevant in any proceeding under the Act.

§21.12 State issued statements.

(a) Any State after the effective date of these regulations may submit to the Regional Administrator for his approval an application to conduct a program for issuing statements under this section.

(1) A State submission shall specify the organizational, legal, financial, and administrative resources and procedures that it believes will enable it to conduct the program.

(2) The State program shall constitute an equivalent effort to that required of EPA under this section.

(3) The State organization responsible for conducting the program should be the State water pollution control agency, as defined in section 502 of the Act.

(4) The State submission shall propose a procedure for adjudicating applicant appeals as provided under §21.9.

(5) The State submission shall identify any existing or potential conflicts of interest on the part of any personnel who will or may review or approve applications.

(i) A conflict of interest shall exist where the reviewing official is the spouse of or dependent (as defined in the Tax Code, 26 U.S.C. 152) of an owner, partner, or principal officer of the small business, or where he has or is receiving from the small business concern applicant 10 percent of gross personal income for a calendar year, except that it shall mean 50 percent gross personal income for a calendar year if the recipient is over 60 years of age and is receiving such portion pursuant to retirement, pension, or similar arrangements.

(ii) If the State is unable to provide alternative parties to review or approve any application subject to conflict of interest, the Regional Administrator shall review and approve the application.

(b) The Regional Administrator, within 60 days after such application, shall approve any State program that conforms to the requirements of this section. Any such approval shall be after sufficient notice has been provided to the Regional Director of SBA.

(c) If the Regional Administrator disapproves the application, he shall notify the State, in writing, of any deficiency in its application. A State may resubmit an amended application at any later time.

(d) Upon approval of a State submission, EPA will suspend all review of applications and issuance of statements for small businesses in that State, pending transferral. *Provided, however,* That in the event of a State conflict of interest as identified in §21.12(a)(4) of this section, EPA shall review the application and issue the statement.

(e) Any applications shall, if received by an EPA Regional Office, be forwarded promptly to the appropriate State for action pursuant to section 7(g)(2) of the Small Business Act and these regulations.

(f)(1) EPA will generally not review or approve individual statements issued by a State. However, SBA, upon receipt and review of a State approved statement may request the Regional Administrator of EPA to review the statement. The Regional Administrator, upon such request can further approve or disapprove the State issued statement, in accordance with the requirements of §21.5.

(2) The Regional Administrator will periodically review State program performance. In the event of State program deficiencies the Regional Administrator will notify the State of such deficiencies.

(3) During that period that any State's program is classified as deficient, statements issued by a State shall also be sent to the Regional Administrator for review. The Regional Administrator shall notify the State, the applicant, and the SBA of any determination subsequently made, in accordance with §21.5, on any such statement.

(i) If within 60 days after notice of such deficiencies has been provided, the State has not taken corrective efforts, and if the deficiencies significantly affect the conduct of the program, the Regional Administrator, after sufficient notice has been provided to the Regional Director of SBA, shall withdraw the approval of the State program.

(ii) Any State whose program is withdrawn and whose deficiencies have been corrected may later reapply as provided in §21.12(a).

(g) Funds appropriated under section 108 of the Act may be utilized by a State agency authorized to receive such funds in conducting this program.

§21.13 Effect of certification upon authority to enforce applicable standards.

The certification by EPA or a State for SBA Loan purposes in no way constitutes a determination by EPA or the State that the facilities certified (a) will be constructed within the time specified by an applicable standard or (b) will be constructed and installed in accordance with the plans and specifications submitted in the application, will be operated and maintained properly, or will be applied to process wastes which are the same as described in the application. The certification in no way constitutes a waiver by EPA or a State of its authority to take appropriate enforcement action against the owner or operator of such facilities for violations of an applicable standard.

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS

Subpart A—General

Sec.

Subpart B—Parties and Appearances

AUTHORITY: 7 U.S.C. 136(l); 15 U.S.C. 2615; 33 U.S.C. 1319, 1342, 1361, 1415 and 1418; 42 U.S.C. 300g–3(g), 6912, 6925, 6928, 6991e and 6992d; 42 U.S.C. 7413(d), 7524(c), 7545(d), 7547, 7601 and 7607(a), 9609, and 11045.

SOURCE: 64 FR 40176, July 23, 1999, unless otherwise noted.

Subpart A—General

§ 22.1 Scope of this part.

(a) These Consolidated Rules of Practice govern all administrative adjudicatory proceedings for:

(1) The assessment of any administrative civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136*l*(a));

(2) The assessment of any administrative civil penalty under sections 113(d), 205(c), 211(d) and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d) and 7547(d));

(3) The assessment of any administrative civil penalty or for the revocation or suspension of any permit under section 105(a) and (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a) and (f));

(4) The issuance of a compliance order or the issuance of a corrective action order, the termination of a permit pursuant to section 3008(a)(3), the suspension or revocation of authority to operate pursuant to section 3005(e), or the assessment of any civil penalty under sections 3008, 9006, and 11005 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6925(d), 6925(e), 6928, 6991e, and 6992d)), except as provided in part 24 of this chapter;

(5) The assessment of any administrative civil penalty under sections 16(a) and 207 of the Toxic Substances Control Act (15 U.S.C. 2615(a) and 2647);

(6) The assessment of any Class II penalty under sections 309(g) and 311(b)(6), or termination of any permit issued pursuant to section 402(a) of the Clean Water Act, as amended (33 U.S.C. 1319(g), 1321(b)(6), and 1342(a));

(7) The assessment of any administrative civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609);

(8) The assessment of any administrative civil penalty under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 ("EPCRA") (42 U.S.C. 11045);

(9) The assessment of any administrative civil penalty under sections 1414(g)(3)(B), 1423(c), and 1447(b) of the Safe Drinking Water Act as amended (42 U.S.C. 300g–3(g)(3)(B), 300h–2(c), and 300j–6(b)), or the issuance of any order requiring both compliance and the assessment of an administrative civil penalty under section 1423(c);

(10) The assessment of any administrative civil penalty or the issuance of any order requiring compliance under Section 6 of the Mercury-Containing and Rechargeable Battery Management Act (42 U.S.C. 14304).

(b) The supplemental rules set forth in subparts H and I of this part establish special procedures for proceedings identified in paragraph (a) of this section where the Act allows or requires procedures different from the procedures in subparts A through G of this part. Where inconsistencies exist between subparts A through G of this part and subpart H or I of this part, subparts H or I of this part shall apply.

(c) Questions arising at any stage of the proceeding which are not addressed in these Consolidated Rules of Practice shall be resolved at the discretion of the Administrator, Environmental Appeals Board, Regional Administrator, or Presiding Officer, as provided for in these Consolidated Rules of Practice.

[64 FR 40176, July 23, 1999, as amended at 65 FR 30904, May 15, 2000]

§ 22.2 Use of number and gender.

As used in these Consolidated Rules of Practice, words in the singular also include the plural and words in the masculine gender also include the feminine, and vice versa, as the case may require.

§ 22.3 Definitions.

(a) The following definitions apply to these Consolidated Rules of Practice:

Act means the particular statute authorizing the proceeding at issue.

Administrative Law Judge means an Administrative Law Judge appointed under 5 U.S.C. 3105.

Administrator means the Administrator of the U.S. Environmental Protection Agency or his delegate.

Agency means the United States Environmental Protection Agency.

Business confidentiality claim means a confidentiality claim as defined in 40 CFR 2.201(h).

Clerk of the Board means the Clerk of the Environmental Appeals Board, Mail Code 1103B, U.S. Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460.

Commenter means any person (other than a party) or representative of such person who timely:

(1) Submits in writing to the Regional Hearing Clerk that he is providing or intends to provide comments on the proposed assessment of a penalty pursuant to sections 309(g)(4) and 311(b)(6)(C) of the Clean Water Act or section 1423(c) of the Safe Drinking Water Act, whichever applies, and intends to participate in the proceeding; and

(5) Order a party, or an officer or agent thereof, to produce testimony, documents, or other non-privileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;

(6) Admit or exclude evidence;

(7) Hear and decide questions of facts, law, or discretion;

(8) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;

(9) Issue subpoenas authorized by the Act; and

(10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these Consolidated Rules of Practice.

(d) *Disqualification, withdrawal and reassignment.* (1) The Administrator, the Regional Administrator, the members of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may not perform functions provided for in these Consolidated Rules of Practice regarding any matter in which they have a financial interest or have any relationship with a party or with the subject matter which would make it inappropriate for them to act. Any party may at any time by motion to the Administrator, Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer or the Administrative Law Judge request that he or she disqualify himself or herself from the proceeding. If such a motion to disqualify the Regional Administrator, Regional Judicial Officer or Administrative Law Judge is denied, a party may appeal that ruling to the Environmental Appeals Board. If a motion to disqualify a member of the Environmental Appeals Board is denied, a party may appeal that ruling to the Administrator. There shall be no interlocutory appeal of the ruling on a motion for disqualification. The Administrator, the Regional Administrator, a member of the Environmental Appeals Board, the Regional Judicial Officer, or the Administrative Law Judge may at any time withdraw from any proceeding in which he deems himself disqualified or unable to act for any reason.

(2) If the Administrator, the Regional Administrator, the Regional Judicial Officer, or the Administrative Law Judge is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in paragraph (d)(1) of this section shall be assigned as a replacement. The Administrator shall assign a replacement for a Regional Administrator who withdraws or is disqualified. Should the Administrator withdraw or be disqualified, the Regional Administrator from the Region where the case originated shall replace the Administrator. If that Regional Administrator would be disqualified, the Administrator shall assign a Regional Administrator from another Region to replace the Administrator. The Regional Administrator shall assign a new Regional Judicial Officer if the original Regional Judicial Officer withdraws or is disqualified. The Chief Administrative Law Judge shall assign a new Administrative Law Judge if the original Administrative Law Judge withdraws or is disqualified.

(3) The Chief Administrative Law Judge, at any stage in the proceeding, may reassign the case to an Administrative Law Judge other than the one originally assigned in the event of the unavailability of the Administrative Law Judge or where reassignment will result in efficiency in the scheduling of hearings and would not prejudice the parties.

§ 22.5 Filing, service, and form of all filed documents; business confidentiality claims.

(a) *Filing of documents.* (1) The original and one copy of each document intended to be part of the record shall be filed with the Regional Hearing Clerk when the proceeding is before the Presiding Officer, or filed with the Clerk of the Board when the proceeding is before the Environmental Appeals Board. A document is filed when it is received by the appropriate Clerk. The Presiding Officer or the Environmental Appeals Board may by order authorize facsimile or electronic filing, subject to any appropriate conditions and limitations.

(2) When the Presiding Officer corresponds directly with the parties, the original of the correspondence shall be filed with the Regional Hearing Clerk. Parties who correspond directly with the Presiding Officer shall file a copy of the correspondence with the Regional Hearing Clerk.

(3) A certificate of service shall accompany each document filed or served in the proceeding.

(b) *Service of documents.* A copy of each document filed in the proceeding shall be served on the Presiding Officer or the Environmental Appeals Board, and on each party.

(1) *Service of complaint.* (i) Complainant shall serve on respondent, or a representative authorized to receive service on respondent's behalf, a copy of the signed original of the complaint, together with a copy of these Consolidated Rules of Practice. Service shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery.

(ii)(A) Where respondent is a domestic or foreign corporation, a partnership, or an unincorporated association which is subject to suit under a common name, complainant shall serve an officer, partner, a managing or general agent, or any other person authorized by appointment or by Federal or State law to receive service of process.

(B) Where respondent is an agency of the United States complainant shall serve that agency as provided by that agency's regulations, or in the absence of controlling regulation, as otherwise permitted by law. Complainant should also provide a copy of the complaint to the senior executive official having responsibility for the overall operations of the geographical unit where the alleged violations arose. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii)(A) of this section.

(C) Where respondent is a State or local unit of government, agency, department, corporation or other instrumentality, complainant shall serve the chief executive officer thereof, or as otherwise permitted by law. Where respondent is a State or local officer, complainant shall serve such officer.

(iii) Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed receipt. Such proof of service shall be filed with the Regional Hearing Clerk immediately upon completion of service.

(2) *Service of filed documents other than the complaint, rulings, orders, and decisions.* All filed documents other than the complaint, rulings, orders, and decisions shall be served personally, by first class mail (including certified mail, return receipt requested, Overnight Express and Priority Mail), or by any reliable commercial delivery service. The Presiding Officer or the Environmental Appeals Board may by order authorize facsimile or electronic service, subject to any appropriate conditions and limitations.

(c) *Form of documents.* (1) Except as provided in this section, or by order of the Presiding Officer or of the Environmental Appeals Board there are no specific requirements as to the form of documents.

(2) The first page of every filed document shall contain a caption identifying the respondent and the docket number. All legal briefs and legal memoranda greater than 20 pages in length (excluding attachments) shall contain a table of contents and a table of authorities with page references.

(3) The original of any filed document (other than exhibits) shall be signed by the party filing or by its attorney or other representative. The signature constitutes a representation by the signer that he has read the document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

(4) The first document filed by any person shall contain the name, address and telephone number of an individual authorized to receive service relating to the proceeding. Parties shall promptly file any changes in this information with the Regional Hearing Clerk, and serve copies on the Presiding Officer and all parties to the proceeding. If a party fails to furnish such information and any changes thereto, service to the party's last

known address shall satisfy the requirements of paragraph (b)(2) of this section and § 22.6.

(5) The Environmental Appeals Board or the Presiding Officer may exclude from the record any document which does not comply with this section. Written notice of such exclusion, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any excluded document upon motion granted by the Environmental Appeals Board or the Presiding Officer, as appropriate.

(d) *Confidentiality of business information.* (1) A person who wishes to assert a business confidentiality claim with regard to any information contained in any document to be filed in a proceeding under these Consolidated Rules of Practice shall assert such a claim in accordance with 40 CFR part 2 at the time that the document is filed. A document filed without a claim of business confidentiality shall be available to the public for inspection and copying.

(2) Two versions of any document which contains information claimed confidential shall be filed with the Regional Hearing Clerk:

(i) One version of the document shall contain the information claimed confidential. The cover page shall include the information required under paragraph (c)(2) of this section and the words "Business Confidentiality Asserted". The specific portion(s) alleged to be confidential shall be clearly identified within the document.

(ii) A second version of the document shall contain all information except the specific information claimed confidential, which shall be redacted and replaced with notes indicating the nature of the information redacted. The cover page shall state that information claimed confidential has been deleted and that a complete copy of the document containing the information claimed confidential has been filed with the Regional Hearing Clerk.

(3) Both versions of the document shall be served on the Presiding Officer and the complainant. Both versions of the document shall be served on any party, non-party participant, or representative thereof, authorized to receive the information claimed confidential by the person making the claim of confidentiality. Only the redacted version shall be served on persons not authorized to receive the confidential information.

(4) Only the second, redacted version shall be treated as public information. An EPA officer or employee may disclose information claimed confidential in accordance with paragraph (d)(1) of this section only as authorized under 40 CFR part 2.

§ 22.6 Filing and service of rulings, orders and decisions.

All rulings, orders, decisions, and other documents issued by the Regional Administrator or Presiding Officer shall be filed with the Regional Hearing Clerk. All such documents issued by the Environmental Appeals Board shall be filed with the Clerk of the Board. Copies of such rulings, orders, decisions or other documents shall be served personally, by first class mail (including by certified mail or return receipt requested, Overnight Express and Priority Mail), by EPA's internal mail, or any reliable commercial delivery service, upon all parties by the Clerk of the Environmental Appeals Board, the Office of Administrative Law Judges or the Regional Hearing Clerk, as appropriate.

§ 22.7 Computation and extension of time.

(a) *Computation.* In computing any period of time prescribed or allowed in these Consolidated Rules of Practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal holidays shall be included. When a stated time expires on a Saturday, Sunday, or Federal holiday, the stated time period shall be extended to include the next business day.

(b) Extensions of time. The Environmental Appeals Board or the Presiding Officer may grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties; or upon its own initiative. Any motion for an extension of time shall be filed sufficiently in advance of the due date so

as to allow other parties reasonable opportunity to respond and to allow the Presiding Officer or Environmental Appeals Board reasonable opportunity to issue an order.

(c) *Service by mail or commercial delivery service.* Service of the complaint is complete when the return receipt is signed. Service of all other documents is complete upon mailing or when placed in the custody of a reliable commercial delivery service. Where a document is served by first class mail or commercial delivery service, but not by overnight or same-day delivery, 5 days shall be added to the time allowed by these Consolidated Rules of Practice for the filing of a responsive document.

§ 22.8 Ex parte discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, the members of the Environmental Appeals Board, the Regional Administrator, the Presiding Officer or any other person who is likely to advise these officials on any decision in the proceeding, discuss *ex parte* the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any *ex parte* memorandum or other communication addressed to the Administrator, the Regional Administrator, the Environmental Appeals Board, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication. The requirements of this section shall not apply to any person who has formally recused himself from all adjudicatory functions in a proceeding, or who issues final orders only pursuant to § 22.18(b)(3).

§ 22.9 Examination of documents filed.

(a) Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during Agency business hours inspect and copy any document filed in any proceeding. Such documents shall be made available by the Regional Hearing Clerk, the Hearing Clerk, or the Clerk of the Board, as appropriate.

(b) The cost of duplicating documents shall be borne by the person seeking copies of such documents. The Agency may waive this cost in its discretion.

Subpart B—Parties and Appearances

§ 22.10 Appearances.

Any party may appear in person or by counsel or other representative. A partner may appear on behalf of a partnership and an officer may appear on behalf of a corporation. Persons who appear as counsel or other representative must conform to the standards of conduct and ethics required of practitioners before the courts of the United States.

§ 22.11 Intervention and non-party briefs.

(a) *Intervention.* Any person desiring to become a party to a proceeding may move for leave to intervene. A motion for leave to intervene that is filed after the exchange of information pursuant to § 22.19(a) shall not be granted unless the movant shows good cause for its failure to file before such exchange of information. All requirements of these Consolidated Rules of Practice shall apply to a motion for leave to intervene as if the movant were a party. The Presiding Officer shall grant leave to intervene in all or part of the proceeding if: the movant claims an interest relating to the cause of action; a final order may as a practical matter impair the movant's ability to protect that interest; and the movant's interest is not adequately represented by existing parties. The intervenor shall be bound by any agreements, arrangements and other matters previously made in the proceeding unless otherwise ordered by the Presiding Officer or the Environmental Appeals Board for good cause.

(b) *Non-party briefs.* Any person who is not a party to a proceeding may move for leave to file a non-party brief. The motion shall identify the interest

of the applicant and shall explain the relevance of the brief to the proceeding. All requirements of these Consolidated Rules of Practice shall apply to the motion as if the movant were a party. If the motion is granted, the Presiding Officer or Environmental Appeals Board shall issue an order setting the time for filing such brief. Any party to the proceeding may file a response to a non-party brief within 15 days after service of the non-party brief.

§ 22.12 Consolidation and severance.

(a) *Consolidation.* The Presiding Officer or the Environmental Appeals Board may consolidate any or all matters at issue in two or more proceedings subject to these Consolidated Rules of Practice where: there exist common parties or common questions of fact or law; consolidation would expedite and simplify consideration of the issues; and consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings. Proceedings subject to subpart I of this part may be consolidated only upon the approval of all parties. Where a proceeding subject to the provisions of subpart I of this part is consolidated with a proceeding to which subpart I of this part does not apply, the procedures of subpart I of this part shall not apply to the consolidated proceeding.

(b) *Severance.* The Presiding Officer or the Environmental Appeals Board may, for good cause, order any proceedings severed with respect to any or all parties or issues.

Subpart C—Prehearing Procedures

§ 22.13 Commencement of a proceeding.

(a) Any proceeding subject to these Consolidated Rules of Practice is commenced by filing with the Regional Hearing Clerk a complaint conforming to § 22.14.

(b) Notwithstanding paragraph (a) of this section, where the parties agree to settlement of one or more causes of action before the filing of a complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a consent agreement and final order pursuant to § 22.18(b)(2) and (3).

§ 22.14 Complaint.

(a) *Content of complaint.* Each complaint shall include:

(1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;

(2) Specific reference to each provision of the Act, implementing regulations, permit or order which respondent is alleged to have violated;

(3) A concise statement of the factual basis for each violation alleged;

(4) A description of all relief sought, including one or more of the following:

(i) The amount of the civil penalty which is proposed to be assessed, and a brief explanation of the proposed penalty;

(ii) Where a specific penalty demand is not made, the number of violations (where applicable, days of violation) for which a penalty is sought, a brief explanation of the severity of each violation alleged and a recitation of the statutory penalty authority applicable for each violation alleged in the complaint;

(iii) A request for a Permit Action and a statement of its proposed terms and conditions; or

(iv) A request for a compliance or corrective action order and a statement of the terms and conditions thereof;

(5) Notice of respondent's right to request a hearing on any material fact alleged in the complaint, or on the appropriateness of any proposed penalty, compliance or corrective action order, or Permit Action;

(6) Notice if subpart I of this part applies to the proceeding;

(7) The address of the Regional Hearing Clerk; and

(8) Instructions for paying penalties, if applicable.

(b) *Rules of practice.* A copy of these Consolidated Rules of Practice shall accompany each complaint served.

(c) *Amendment of the complaint.* The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer. Respondent shall have 20 additional days from the date of service of the amended complaint to file its answer.

(d) *Withdrawal of the complaint.* The complainant may withdraw the complaint, or any part thereof, without prejudice one time before the answer has been filed. After one withdrawal before the filing of an answer, or after the filing of an answer, the complainant may withdraw the complaint, or any part thereof, without prejudice only upon motion granted by the Presiding Officer.

§ 22.15 Answer to the complaint.

(a) *General.* Where respondent: Contests any material fact upon which the complaint is based; contends that the proposed penalty, compliance or corrective action order, or Permit Action, as the case may be, is inappropriate; or contends that it is entitled to judgment as a matter of law, it shall file an original and one copy of a written answer to the complaint with the Regional Hearing Clerk and shall serve copies of the answer on all other parties. Any such answer to the complaint must be filed with the Regional Hearing Clerk within 30 days after service of the complaint.

(b) *Contents of the answer.* The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state: The circumstances or arguments which are alleged to constitute the grounds of any defense; the facts which respondent disputes; the basis for opposing any proposed relief; and whether a hearing is requested.

(c) *Request for a hearing.* A hearing upon the issues raised by the complaint and answer may be held if requested by respondent in its answer. If the respondent does not request a hearing, the Presiding Officer may hold a hearing if issues appropriate for adjudication are raised in the answer.

(d) *Failure to admit, deny, or explain.* Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

(e) *Amendment of the answer.* The respondent may amend the answer to the complaint upon motion granted by the Presiding Officer.

§ 22.16 Motions.

(a) *General.* Motions shall be served as provided by § 22.5(b)(2). Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response. Any additional responsive documents shall be permitted only by order of the Presiding Officer or Environmental Appeals Board, as appropriate. All motions, except those made orally on the record during a hearing, shall:

(1) Be in writing;

(2) State the grounds therefor, with particularity;

(3) Set forth the relief sought; and

(4) Be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.

(b) *Response to motions.* A party's response to any written motion must be filed within 15 days after service of such motion. The movant's reply to any written response must be filed within 10 days after service of such response and shall be limited to issues raised in the response. The Presiding Officer or the Environmental Appeals Board may set a shorter or longer time for response or reply, or make other orders concerning the disposition of motions. The response or reply shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Any party who fails to respond within the designated period waives any objection to the granting of the motion.

(c) *Decision.* The Regional Judicial Officer (or in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board) shall rule on all motions filed or made before an answer to the complaint is filed. Except as provided in §§ 22.29(c) and 22.51, an Administrative Law Judge shall rule on all motions filed or made after an answer is filed and before an initial decision has become final or has been appealed. The Environmental Appeals Board shall rule as provided in § 22.29(c) and on all motions filed or made after an

appeal of the initial decision is filed, except as provided pursuant to § 22.28.

(d) *Oral argument.* The Presiding Officer or the Environmental Appeals Board may permit oral argument on motions in its discretion.

§ 22.17 Default.

(a) *Default.* A party may be found to be in default: after motion, upon failure to file a timely answer to the complaint; upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer; or upon failure to appear at a conference or hearing. Default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations. Default by complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice.

(b) *Motion for default.* A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty or the imposition of other relief against a defaulting party, the movant must specify the penalty or other relief sought and state the legal and factual grounds for the relief requested.

(c) *Default order.* When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. For good cause shown, the Presiding Officer may set aside a default order.

(d) *Payment of penalty; effective date of compliance or corrective action orders, and Permit Actions.* Any penalty assessed in the default order shall become due and payable by respondent without further proceedings 30 days after the default order becomes final under § 22.27(c). Any default order requiring compliance or corrective action shall be effective and enforceable without further proceedings on the date the default order becomes final under § 22.27(c). Any Permit Action ordered in the default order shall become effective without further proceedings on the date that the default order becomes final under § 22.27(c).

§ 22.18 Quick resolution; settlement; alternative dispute resolution.

(a) *Quick resolution.* (1) A respondent may resolve the proceeding at any time by paying the specific penalty proposed in the complaint or in complainant's prehearing exchange in full as specified by complainant and by filing with the Regional Hearing Clerk a copy of the check or other instrument of payment. If the complaint contains a specific proposed penalty and respondent pays that proposed penalty in full within 30 days after receiving the complaint, then no answer need be filed. This paragraph (a) shall not apply to any complaint which seeks a compliance or corrective action order or Permit Action. In a proceeding subject to the public comment provisions of § 22.45, this quick resolution is not available until 10 days after the close of the comment period.

(2) Any respondent who wishes to resolve a proceeding by paying the proposed penalty instead of filing an answer, but who needs additional time to pay the penalty, may file a written statement with the Regional Hearing Clerk within 30 days after receiving the complaint stating that the respondent agrees to pay the proposed penalty in accordance with paragraph (a)(1) of this section. The written statement need not contain any response to, or admission of, the allegations in the complaint. Within 60 days after receiving the complaint, the respondent shall pay the full amount of the proposed penalty. Failure to make such payment within 60 days of receipt of the complaint may subject the respondent to default pursuant to § 22.17.

(3) Upon receipt of payment in full, the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, shall issue a final order. Payment by respondent shall constitute a waiver of respondent's rights to contest the allegations and to appeal the final order.

(b) *Settlement.* (1) The Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. The parties may engage in settlement discussions whether or not the respondent requests a hearing. Settlement discussions shall not affect the respondent's obligation to file a timely answer under § 22.15.

(2) *Consent agreement.* Any and all terms and conditions of a settlement shall be recorded in a written consent agreement signed by all parties or their representatives. The consent agreement shall state that, for the purpose of the proceeding, respondent: Admits the jurisdictional allegations of the complaint; admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; consents to the assessment of any stated civil penalty, to the issuance of any specified compliance or corrective action order, to any conditions specified in the consent agreement, and to any stated Permit Action; and waives any right to contest the allegations and its right to appeal the proposed final order accompanying the consent agreement. Where complainant elects to commence a proceeding pursuant to § 22.13(b), the consent agreement shall also contain the elements described at § 22.14(a)(1)–(3) and (8). The parties shall forward the executed consent agreement and a proposed final order to the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board.

(3) *Conclusion of proceeding.* No settlement or consent agreement shall dispose of any proceeding under these Consolidated Rules of Practice without a final order from the Regional Judicial Officer or Regional Administrator, or, in a proceeding commenced at EPA Headquarters, the Environmental Appeals Board, ratifying the parties' consent agreement.

(c) *Scope of resolution or settlement.* Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. Full payment of the penalty proposed in a complaint pursuant to paragraph (a) of this section or settlement pursuant to paragraph (b) of this section shall only resolve respondent's liability for Federal civil penalties for the violations and facts alleged in the complaint.

(d) *Alternative means of dispute resolution.* (1) The parties may engage in any process within the scope of the Alternative Dispute Resolution Act ("ADRA"), 5 U.S.C. 581 *et seq.*, which may facilitate voluntary settlement efforts. Such process shall be subject to the confidentiality provisions of the ADRA.

(2) Dispute resolution under this paragraph (d) does not divest the Presiding Officer of jurisdiction and does not automatically stay the proceeding. All provisions of these Consolidated Rules of Practice remain in effect notwithstanding any dispute resolution proceeding.

(3) The parties may choose any person to act as a neutral, or may move for the appointment of a neutral. If the Presiding Officer grants a motion for the appointment of a neutral, the Presiding Officer shall forward the motion to the Chief Administrative Law Judge, except in proceedings under subpart I of this part, in which the Presiding Officer shall forward the motion to the Regional Administrator. The Chief Administrative Law Judge or Regional Administrator, as appropriate, shall designate a qualified neutral.

§ 22.19 Prehearing information exchange; prehearing conference; other discovery.

(a) *Prehearing information exchange.* (1) In accordance with an order issued by the Presiding Officer, each party

shall file a prehearing information exchange. Except as provided in § 22.22(a), document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence, and any witness whose name and testimony summary has not been included in prehearing information exchange shall not be allowed to testify. Parties are not required to exchange information relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence. Documents and exhibits shall be marked for identification as ordered by the Presiding Officer.

(2) Each party's prehearing information exchange shall contain:

(i) The names of any expert or other witnesses it intends to call at the hearing, together with a brief narrative summary of their expected testimony, or a statement that no witnesses will be called; and (ii) Copies of all documents and exhibits which it intends to introduce into evidence at the hearing.

(3) If the proceeding is for the assessment of a penalty and complainant has already specified a proposed penalty, complainant shall explain in its prehearing information exchange how the proposed penalty was calculated in accordance with any criteria set forth in the Act, and the respondent shall explain in its prehearing information exchange why the proposed penalty should be reduced or eliminated.

(4) If the proceeding is for the assessment of a penalty and complainant has not specified a proposed penalty, each party shall include in its prehearing information exchange all factual information it considers relevant to the assessment of a penalty. Within 15 days after respondent files its prehearing information exchange, complainant shall file a document specifying a proposed penalty and explaining how the proposed penalty was calculated in accordance with any criteria set forth in the Act.

(b) *Prehearing conference.* The Presiding Officer, at any time before the hearing begins, may direct the parties and their counsel or other representatives to participate in a conference to consider:

(1) Settlement of the case;

(2) Simplification of issues and stipulation of facts not in dispute;

(3) The necessity or desirability of amendments to pleadings;

(4) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;

(5) The limitation of the number of expert or other witnesses;

(6) The time and place for the hearing; and

(7) Any other matters which may expedite the disposition of the proceeding.

(c) *Record of the prehearing conference.* No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conferences shall be made unless ordered by the Presiding Officer. The Presiding Officer shall ensure that the record of the proceeding includes any stipulations, agreements, rulings or orders made during the conference.

(d) *Location of prehearing conference.* The prehearing conference shall be held in the county where the respondent resides or conducts the business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional Office is located, or in Washington, DC, unless the Presiding Officer determines that there is good cause to hold it at another location or by telephone.

(e) *Other discovery.* (1) After the information exchange provided for in paragraph (a) of this section, a party may move for additional discovery. The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted). The Presiding Officer may order such other discovery only if it:

(i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;

(ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and

(iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

(2) Settlement positions and information regarding their development (such as penalty calculations for purposes of settlement based upon Agency settlement policies) shall not be discoverable.

(3) The Presiding Officer may order depositions upon oral questions only in accordance with paragraph (e)(1) of this section and upon an additional finding that:

(i) The information sought cannot reasonably be obtained by alternative methods of discovery; or

(ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(4) The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act. The Presiding Officer may issue a subpoena for discovery purposes only in accordance with paragraph (e)(1) of this section and upon an additional showing of the grounds and necessity therefor. Subpoenas shall be served in accordance with § 22.5(b)(1). Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Any fees shall be paid by the party at whose request the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

(5) Nothing in this paragraph (e) shall limit a party's right to request admissions or stipulations, a respondent's right to request Agency records under the Federal Freedom of Information Act, 5 U.S.C. 552, or EPA's authority under any applicable law to conduct inspections, issue information request letters or administrative subpoenas, or otherwise obtain information.

(f) *Supplementing prior exchanges.* A party who has made an information exchange under paragraph (a) of this section, or who has exchanged information in response to a request for information or a discovery order pursuant to paragraph (e) of this section, shall promptly supplement or correct the exchange when the party learns that the information exchanged or response provided is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

(g) *Failure to exchange information.* Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion:

(1) Infer that the information would be adverse to the party failing to provide it;

(2) Exclude the information from evidence; or

(3) Issue a default order under § 22.17(c).

§ 22.20 Accelerated decision; decision to dismiss.

(a) *General.* The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law. The Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

(b) *Effect.* (1) If an accelerated decision or a decision to dismiss is issued as to all issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk.

(2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted. The partial accelerated decision or the order dismissing certain counts shall

specify the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

Subpart D—Hearing Procedures

§ 22.21 Assignment of Presiding Officer; scheduling the hearing.

(a) *Assignment of Presiding Officer.* When an answer is filed, the Regional Hearing Clerk shall forward a copy of the complaint, the answer, and any other documents filed in the proceeding to the Chief Administrative Law Judge who shall serve as Presiding Officer or assign another Administrative Law Judge as Presiding Officer. The Presiding Officer shall then obtain the case file from the Chief Administrative Law Judge and notify the parties of his assignment.

(b) *Notice of hearing.* The Presiding Officer shall hold a hearing if the proceeding presents genuine issues of material fact. The Presiding Officer shall serve upon the parties a notice of hearing setting forth a time and place for the hearing not later than 30 days prior to the date set for the hearing. The Presiding Officer may require the attendance of witnesses or the production of documentary evidence by subpoena, if authorized under the Act, upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced.

(c) *Postponement of hearing.* No request for postponement of a hearing shall be granted except upon motion and for good cause shown.

(d) *Location of the hearing.* The location of the hearing shall be determined in accordance with the method for determining the location of a prehearing conference under § 22.19(d).

§ 22.22 Evidence.

(a) *General.* (1) The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible. If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19 (a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

(2) In the presentation, admission, disposition, and use of oral and written evidence, EPA officers, employees and authorized representatives shall preserve the confidentiality of information claimed confidential, whether or not the claim is made by a party to the proceeding, unless disclosure is authorized pursuant to 40 CFR part 2. A business confidentiality claim shall not prevent information from being introduced into evidence, but shall instead require that the information be treated in accordance with 40 CFR part 2, subpart B. The Presiding Officer or the Environmental Appeals Board may consider such evidence in a proceeding closed to the public, and which may be before some, but not all, parties, as necessary. Such proceeding shall be closed only to the extent necessary to comply with 40 CFR part 2, subpart B, for information claimed confidential. Any affected person may move for an order protecting the information claimed confidential.

(b) *Examination of witnesses.* Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in paragraphs (c) and (d) of this section or by the Presiding Officer. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.

(c) *Written testimony.* The Presiding Officer may admit and insert into the record as evidence, in lieu of oral testimony, written testimony prepared by a witness. The admissibility of any part of the testimony shall be subject to the same rules as if the testimony were produced under oral examination. Before any such testimony is read or admitted into evidence, the party who has called the witness shall deliver a copy of the testimony to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the testimony shall swear to or affirm the testimony and shall be subject to appropriate oral cross-examination.

(d) *Admission of affidavits where the witness is unavailable.* The Presiding Officer may admit into evidence affidavits of witnesses who are unavailable. The term "unavailable" shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence.

(e) *Exhibits.* Where practicable, an original and one copy of each exhibit shall be filed with the Presiding Officer for the record and a copy shall be furnished to each party. A true copy of any exhibit may be substituted for the original.

(f) *Official notice.* Official notice may be taken of any matter which can be judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

§ 22.23 Objections and offers of proof.

(a) *Objection.* Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Presiding Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

(b) *Offers of proof.* Whenever the Presiding Officer denies a motion for admission into evidence, the party offering the information may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the information excluded. The offer of proof for excluded documents or exhibits shall consist of the documents or exhibits excluded. Where the Environmental Appeals Board decides that the ruling of the Presiding Officer in excluding the information from evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

§ 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.

(a) The complainant has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate. Following complainant's establishment of a prima facie case, respondent shall have the burden of presenting any defense to the allegations set forth in the complaint and any response or evidence with respect to the appropriate relief. The respondent has the burdens of presentation and persuasion for any affirmative defenses.

(b) Each matter of controversy shall be decided by the Presiding Officer upon a preponderance of the evidence.

§ 22.25 Filing the transcript.

The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Regional Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with the Agency, and also shall transmit to the Presiding Officer a copy of the transcript. A certificate of service shall accompany each copy of the transcript. The Regional Hearing Clerk shall notify all parties of the availability of the transcript and shall furnish the parties with a copy of the transcript upon payment of the cost of reproduction, unless a party can show that the cost is unduly burdensome. Any person not a party to the proceeding may receive a copy of the transcript upon payment of the reproduction fee, except for those parts of the transcript ordered to be kept confidential by the Presiding Officer. Any party may file a motion to conform the transcript to the actual testimony within 30 days after receipt of the transcript, or 45 days after the parties are notified of the availability of the transcript, whichever is sooner.

§ 22.26 Proposed findings, conclusions, and order.

After the hearing, any party may file proposed findings of fact, conclusions

of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a schedule for filing these documents and any reply briefs, but shall not require them before the last date for filing motions under § 22.25 to conform the transcript to the actual testimony. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

Subpart E—Initial Decision and Motion To Reopen a Hearing

§ 22.27 Initial Decision.

(a) *Filing and contents.* After the period for filing briefs under § 22.26 has expired, the Presiding Officer shall issue an initial decision. The initial decision shall contain findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, and, if appropriate, a recommended civil penalty assessment, compliance order, corrective action order, or Permit Action. Upon receipt of an initial decision, the Regional Hearing Clerk shall forward copies of the initial decision to the Environmental Appeals Board and the Assistant Administrator for the Office of Enforcement and Compliance Assurance.

(b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become a final order 45 days after its service upon the parties and without further proceedings unless:

(1) A party moves to reopen the hearing;

(2) A party appeals the initial decision to the Environmental Appeals Board;

(3) A party moves to set aside a default order that constitutes an initial decision; or

(4) The Environmental Appeals Board elects to review the initial decision on its own initiative.

(d) *Exhaustion of administrative remedies.* Where a respondent fails to appeal an initial decision to the Environmental Appeals Board pursuant to § 22.30 and that initial decision becomes a final order pursuant to paragraph (c) of this section, respondent waives its rights to judicial review. An initial decision that is appealed to the Environmental Appeals Board shall not be final or operative pending the Environmental Appeals Board's issuance of a final order.

§ 22.28 Motion to reopen a hearing.

(a) *Filing and content.* A motion to reopen a hearing to take further evidence must be filed no later than 20 days after service of the initial decision and shall state the specific grounds upon which relief is sought. Where the movant seeks to introduce new evidence, the motion shall: state briefly the nature and purpose of the evidence to be adduced; show that such evidence is not cumulative; and show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Regional Hearing Clerk.

(b) *Disposition of motion to reopen a hearing.* Within 15 days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the Regional Hearing Clerk and serve on all other parties a response. A reopened hearing shall be governed by the applicable sections of these Consolidated Rules of Practice.

The filing of a motion to reopen a hearing shall automatically stay the running of the time periods for an initial decision becoming final under § 22.27(c) and for appeal under § 22.30. These time periods shall begin again in full when the motion is denied or an amended initial decision is served.

Subpart F—Appeals and Administrative Review

§ 22.29 Appeal from or review of interlocutory orders or rulings.

(a) *Request for interlocutory appeal.* Appeals from orders or rulings other than an initial decision shall be allowed only at the discretion of the Environmental Appeals Board. A party seeking interlocutory appeal of such orders or rulings to the Environmental Appeals Board shall file a motion within 10 days of service of the order or ruling, requesting that the Presiding Officer forward the order or ruling to the Environmental Appeals Board for review, and stating briefly the grounds for the appeal.

(b) *Availability of interlocutory appeal.* The Presiding Officer may recommend any order or ruling for review by the Environmental Appeals Board when:

(1) The order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion; and

(2) Either an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or review after the final order is issued will be inadequate or ineffective.

(c) *Interlocutory review.* If the Presiding Officer has recommended review and the Environmental Appeals Board determines that interlocutory review is inappropriate, or takes no action within 30 days of the Presiding Officer's recommendation, the appeal is dismissed. When the Presiding Officer declines to recommend review of an order or ruling, it may be reviewed by the Environmental Appeals Board only upon appeal from the initial decision, except when the Environmental Appeals Board determines, upon motion of a party and in exceptional circumstances, that to delay review would be contrary to the public interest. Such motion shall be filed within 10 days of service of an order of the Presiding Officer refusing to recommend such order or ruling for interlocutory review.

§ 22.30 Appeal from or review of initial decision.

(a) *Notice of appeal.* (1) Within 30 days after the initial decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board (Clerk of the Board (Mail Code 1103B), United States Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460. Hand deliveries may be made at Suite 600, 1341 G Street, NW.).). One copy of any document filed with the Clerk of the Board shall also be served on the Regional Hearing Clerk. Appellant also shall serve a copy of the notice of appeal upon the Presiding Officer. Appellant shall simultaneously serve one copy of the notice and brief upon all other parties and non-party participants. The notice of appeal shall summarize the order or ruling, or part thereof, appealed from. The appellant's brief shall contain tables of contents and authorities (with page references), a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review (with appropriate references to the record), argument on the issues presented, a short conclusion stating the precise relief sought, alternative findings of fact, and alternative conclusions regarding issues of law or discretion. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal on any issue within 20 days after the date on which the first notice of appeal was served.

(2) Within 20 days of service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or non-party participant may file with the Environmental Appeals Board an original and one copy of a response brief responding to argument raised by the appellant, together with reference to the relevant portions of the record, initial decision, or opposing brief. Appellee shall simultaneously serve one

copy of the response brief upon each party . non-party participant, and the Regional Hearing Clerk. Response briefs shall be limited to the scope of the appeal brief. Further briefs may be filed only with the permission of the Environmental Appeals Board.

(b) *Review initiated by the Environmental Appeals Board.* Whenever the Environmental Appeals Board determines to review an initial decision on its own initiative, it shall file notice of its intent to review that decision with the Clerk of the Board, and serve it upon the Regional Hearing Clerk, the Presiding Officer and the parties within 45 days after the initial decision was served upon the parties. The notice shall include a statement of issues to be briefed by the parties and a time schedule for the filing and service of briefs.

(c) *Scope of appeal or review.* The parties' rights of appeal shall be limited to those issues raised during the course of the proceeding and by the initial decision, and to issues concerning subject matter jurisdiction. If the Environmental Appeals Board determines that issues raised, but not appealed by the parties, should be argued, it shall give the parties reasonable written notice of such determination to permit preparation of adequate argument. The Environmental Appeals Board may remand the case to the Presiding Officer for further proceedings.

(d) *Argument before the Environmental Appeals Board.* The Environmental Appeals Board may, at its discretion, order oral argument on any or all issues in a proceeding.

(e) *Motions on appeal.* All motions made during the course of an appeal shall conform to §22.16 unless otherwise provided.

(f) *Decision.* The Environmental Appeals Board shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions. The Environmental Appeals Board may assess a penalty that is higher or lower than the amount recommended to be assessed in the decision or order being reviewed or from the amount sought in the complaint, except that if the order being reviewed is a default order, the Environmental Appeals Board may not increase the amount of the penalty above that proposed in the complaint or in the motion for default, whichever is less. The Environmental Appeals Board may adopt, modify or set aside any recommended compliance or corrective action order or Permit Action. The Environmental Appeals Board may remand the case to the Presiding Officer for further action.

[64 FR 40176, July 23, 1999, as amended at 68 FR 2204, Jan. 16, 2003]

Subpart G—Final Order

§22.31 Final order.

(a) *Effect of final order.* A final order constitutes the final Agency action in a proceeding. The final order shall not in any case affect the right of the Agency or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law. The final order shall resolve only those causes of action alleged in the complaint, or for proceedings commenced pursuant to §22.13(b), alleged in the consent agreement. The final order does not waive, extinguish or otherwise affect respondent's obligation to comply with all applicable provisions of the Act and regulations promulgated thereunder.

(b) *Effective date.* A final order is effective upon filing. Where an initial decision becomes a final order pursuant to §22.27(c), the final order is effective 45 days after the initial decision is served on the parties.

(c) *Payment of a civil penalty.* The respondent shall pay the full amount of any civil penalty assessed in the final order within 30 days after the effective date of the final order unless otherwise ordered. Payment shall be made by sending a cashier's check or certified check to the payee specified in the complaint, unless otherwise instructed by the complainant. The check shall note the case title and docket number. Respondent shall serve copies of the check or other instrument of payment on the Regional Hearing Clerk and on complainant. Collection of interest on overdue payments shall be in accordance with the Debt Collection Act, 31 U.S.C. 3717.

(d) *Other relief.* Any final order requiring compliance or corrective action, or a Permit Action, shall become effective and enforceable without further proceedings on the effective date of the final order unless otherwise ordered.

(e) *Final orders to Federal agencies on appeal.* (1) A final order of the Environmental Appeals Board issued pursuant to §22.30 to a department, agency, or instrumentality of the United States shall become effective 30 days after its service upon the parties unless the head of the affected department, agency, or instrumentality requests a conference with the Administrator in writing and serves a copy of the request on the parties of record within 30 days of service of the final order. If a timely request is made, a decision by the Administrator shall become the final order.

(2) A motion for reconsideration pursuant to §22.32 shall not toll the 30-day period described in paragraph (e)(1) of this section unless specifically so ordered by the Environmental Appeals Board.

§22.32 Motion to reconsider a final order.

Motions to reconsider a final order issued pursuant to §22.30 shall be filed within 10 days after service of the final order. Motions must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision shall be directed to, and decided by, the Environmental Appeals Board. Motions for reconsideration directed to the Administrator, rather than to the Environmental Appeals Board, will not be considered, except in cases that the Environmental Appeals Board has referred to the Administrator pursuant to §22.4(a) and in which the Administrator has issued the final order. A motion for reconsideration shall not stay the effective date of the final order unless so ordered by the Environmental Appeals Board.

Subpart H—Supplemental Rules

§22.33 [Reserved]

§22.34 Supplemental rules governing the administrative assessment of civil penalties under the Clean Air Act.

(a) *Scope.* This section shall apply, in conjunction with §§22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under sections 113(d), 205(c), 211(d), and 213(d) of the Clean Air Act, as amended (42 U.S.C. 7413(d), 7524(c), 7545(d), and 7547(d)). Where inconsistencies exist between this section and §§22.1 through 22.32, this section shall apply.

(b) *Issuance of notice.* Prior to the issuance of a final order assessing a civil penalty, the person to whom the order is to be issued shall be given written notice of the proposed issuance of the order. Service of a complaint or a consent agreement and final order pursuant to §22.13 satisfies this notice requirement.

§22.35 Supplemental rules governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.

(a) *Scope.* This section shall apply, in conjunction with §§22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136l(a)). Where inconsistencies exist between this section and §§22.1 through 22.32, this section shall apply.

(b) *Venue.* The prehearing conference and the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed in writing by all parties. For a person whose residence is outside the United States and outside any territory or possession of the United States, the prehearing conference and the hearing shall be held at the EPA office listed at 40 CFR 1.7 that is closest to either the person's primary place of business within the

United States, or the primary place of business of the person's U.S. agent, unless otherwise agreed by all parties.

§ 22.36 [Reserved]

§ 22.37 Supplemental rules governing administrative proceedings under the Solid Waste Disposal Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings under sections 3005(d) and (e), 3008, 9003 and 9006 of the Solid Waste Disposal Act (42 U.S.C. 6925(d) and (e), 6928, 6991b and 6991e) ("SWDA"). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Corrective action and compliance orders.* A complaint may contain a compliance order issued under section 3008(a) or section 9006(a), or a corrective action order issued under section 3008(h) or section 9003(h)(4) of the SWDA. Any such order shall automatically become a final order unless, no later than 30 days after the order is served, the respondent requests a hearing pursuant to § 22.15.

§ 22.38 Supplemental rules of practice governing the administrative assessment of civil penalties under the Clean Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32 and § 22.45, in administrative proceedings for the assessment of any civil penalty under section 309(g) or section 311(b)(6) of the Clean Water Act ("CWA")(33 U.S.C. 1319(g) and 1321(b)(6)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Consultation with States.* For proceedings pursuant to section 309(g), the complainant shall provide the State agency with the most direct authority over the matters at issue in the case an opportunity to consult with the complainant. Complainant shall notify the State agency within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty.

(c) *Administrative procedure and judicial review.* Action of the Administrator for which review could have been obtained under section 509(b)(1) of the CWA, 33 U.S.C. 1369(b)(1), shall not be subject to review in an administrative proceeding for the assessment of a civil penalty under section 309(g) or section 311(b)(6).

§ 22.39 Supplemental rules governing the administrative assessment of civil penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.10 through 22.32, in administrative proceedings for the assessment of any civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Judicial review.* Any person who requested a hearing with respect to a Class II civil penalty under section 109(b) of CERCLA, 42 U.S.C. 9609(b), and who is the recipient of a final order assessing a civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia or for any other circuit in which such person resides or transacts business. Any person who requested a hearing with respect to a Class I civil penalty under section 109(a)(4) of CERCLA, 42 U.S.C. 9609(a)(4), and who is the recipient of a final order assessing the civil penalty may file a petition for judicial review of such order with the appropriate district court of the United States. All petitions must be filed within 30 days of the date the order making the assessment was served on the parties.

(c) *Payment of civil penalty assessed.* Payment of civil penalties assessed in the final order shall be made by forwarding a cashier's check, payable to the "EPA, Hazardous Substances Superfund," in the amount assessed, and noting the case title and docket number, to the appropriate regional Superfund Lockbox Depository.

§ 22.40 [Reserved]

§ 22.41 Supplemental rules governing the administrative assessment of civil penalties under Title II of the Toxic Substance Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty conducted under section 207 of the Toxic Substances Control Act ("TSCA") (15 U.S.C. 2647). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Collection of civil penalty.* Any civil penalty collected under TSCA section 207 shall be used by the local educational agency for purposes of complying with Title II of TSCA. Any portion of a civil penalty remaining unspent after a local educational agency achieves compliance shall be deposited into the Asbestos Trust Fund established under section 5 of AHERA.

§ 22.42 Supplemental rules governing the administrative assessment of civil penalties for violations of compliance orders issued to owners or operators of public water systems under part B of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty under section 1414(g)(3)(B) of the Safe Drinking Water Act, 42 U.S.C. 300g-3(g)(3)(B). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Choice of forum.* A complaint which specifies that subpart I of this part applies shall also state that respondent has a right to elect a hearing on the record in accordance with 5 U.S.C. 554, and that respondent waives this right unless it requests in its answer a hearing on the record in accordance with 5 U.S.C. 554. Upon such request, the Regional Hearing Clerk shall recaption the documents in the record as necessary, and notify the parties of the changes.

§ 22.43 Supplemental rules governing the administrative assessment of civil penalties against a federal agency under the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings to assess a civil penalty against a federal agency under section 1447(b) of the Safe Drinking Water Act, 42 U.S.C. 300j-6(b). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Effective date of final penalty order.* Any penalty order issued pursuant to this section and section 1447(b) of the Safe Drinking Water Act shall become effective 30 days after it has been served on the parties.

(c) *Public notice of final penalty order.* Upon the issuance of a final penalty order under this section, the Administrator shall provide public notice of the order by publication, and by providing notice to any person who requests such notice. The notice shall include:

(1) The docket number of the order;

(2) The address and phone number of the Regional Hearing Clerk from whom a copy of the order may be obtained;

(3) The location of the facility where violations were found;

(4) A description of the violations;

(5) The penalty that was assessed; and

(6) A notice that any interested person may, within 30 days of the date the order becomes final, obtain judicial review of the penalty order pursuant to section 1447(b) of the Safe Drinking Water Act, and instruction that persons seeking judicial review shall provide copies of any appeal to the persons described in 40 CFR 135.11(a).

§ 22.44 Supplemental rules of practice governing the termination of permits under section 402(a) of the Clean Water Act or under section 3008(a)(3) of the Resource Conservation and Recovery Act.

(a) *Scope of this subpart.* The supplemental rules of practice in this subpart shall also apply in conjunction with the Consolidated Rules of Practice in this part and with the administrative proceedings for the termination of permits under section 402(a) of the Clean Water Act or under section 3008(a)(3) of

the Resource Conservation and Recovery Act. Notwithstanding the Consolidated Rules of Practice, these supplemental rules shall govern with respect to the termination of such permits.

(b) In any proceeding to terminate a permit for cause under § 122.64 or § 270.43 of this chapter during the term of the permit:

(1) The complaint shall, in addition to the requirements of § 22.14(b), contain any additional information specified in § 124.8 of this chapter;

(2) The Director (as defined in § 124.2 of this chapter) shall provide public notice of the complaint in accordance with § 124.10 of this chapter, and allow for public comment in accordance with § 124.11 of this chapter; and

(3) The Presiding Officer shall admit into evidence the contents of the Administrative Record described in § 124.9 of this chapter, and any public comments received.

[65 FR 30904, May 15, 2000]

§ 22.45 Supplemental rules governing public notice and comment in proceedings under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act and section 1423(c) of the Safe Drinking Water Act.

(a) *Scope.* This section shall apply, in conjunction with §§ 22.1 through 22.32, in administrative proceedings for the assessment of any civil penalty under sections 309(g) and 311(b)(6)(B)(ii) of the Clean Water Act (33 U.S.C. 1319(g) and 1321(b)(6)(B)(ii)), and under section 1423(c) of the Safe Drinking Water Act (42 U.S.C. 300h-2(c)). Where inconsistencies exist between this section and §§ 22.1 through 22.32, this section shall apply.

(b) *Public notice.*—(1) *General.* Complainant shall notify the public before assessing a civil penalty. Such notice shall be provided within 30 days following proof of service of the complaint on the respondent or, in the case of a proceeding proposed to be commenced pursuant to § 22.13(b), no less than 40 days before the issuance of an order assessing a civil penalty. The notice period begins upon first publication of notice.

(2) *Type and content of public notice.* The complainant shall provide public notice of the complaint (or the proposed consent agreement if § 22.13(b) is applicable) by a method reasonably calculated to provide notice, and shall also provide notice directly to any person who requests such notice. The notice shall include:

(i) The docket number of the proceeding;

(ii) The name and address of the complainant and respondent, and the person from whom information on the proceeding may be obtained, and the address of the Regional Hearing Clerk to whom appropriate comments shall be directed;

(iii) The location of the site or facility from which the violations are alleged, and any applicable permit number;

(iv) A description of the violation alleged and the relief sought; and

(v) A notice that persons shall submit comments to the Regional Hearing Clerk, and the deadline for such submissions.

(c) *Comment by a person who is not a party.* The following provisions apply in regard to comment by a person not a party to a proceeding:

(1) *Participation in proceeding.* (i) Any person wishing to participate in the proceedings must notify the Regional Hearing Clerk in writing within the public notice period under paragraph (b)(1) of this section. The person must provide his name, complete mailing address, and state that he wishes to participate in the proceeding.

(ii) The Presiding Officer shall provide notice of any hearing on the merits to any person who has met the requirements of paragraph (c)(1)(i) of this section at least 20 days prior to the scheduled hearing.

(iii) A commenter may present written comments for the record at any time prior to the close of the record.

(iv) A commenter wishing to present evidence at a hearing on the merits shall notify, in writing, the Presiding Officer and the parties of its intent at least 10 days prior to the scheduled hearing. This notice must include a copy of any document to be introduced, a description of the evidence to be presented, and the identity of any witness (and qualifications if an expert), and the subject matter of the testimony.

(v) In any hearing on the merits, a commenter may present evidence, including direct testimony subject to cross examination by the parties.

(vi) The Presiding Officer shall have the discretion to establish the extent of commenter participation in any other scheduled activity.

(2) *Limitations.* A commenter may not cross-examine any witness in any hearing and shall not be subject to or participate in any discovery or prehearing exchange.

(3) *Quick resolution and settlement.* No proceeding subject to the public notice and comment provisions of paragraphs (b) and (c) of this section may be resolved or settled under § 22.18, or commenced under § 22.13(b), until 10 days after the close of the comment period provided in paragraph (c)(1) of this section.

(4) *Petition to set aside a consent agreement and proposed final order.* (i) Complainant shall provide to each commenter, by certified mail, return receipt requested, but not to the Regional Hearing Clerk or Presiding Officer, a copy of any consent agreement between the parties and the proposed final order.

(ii) Within 30 days of receipt of the consent agreement and proposed final order a commenter may petition the Regional Administrator (or, for cases commenced at EPA Headquarters, the Environmental Appeals Board), to set aside the consent agreement and proposed final order on the basis that material evidence was not considered. Copies of the petition shall be served on the parties, but shall not be sent to the Regional Hearing Clerk or the Presiding Officer.

(iii) Within 15 days of receipt of a petition, the complainant may, with notice to the Regional Administrator or Environmental Appeals Board and to the commenter, withdraw the consent agreement and proposed final order to consider the matters raised in the petition. If the complainant does not give notice of withdrawal within 15 days of receipt of the petition, the Regional Administrator or Environmental Appeals Board shall assign a Petition Officer to consider and rule on the petition. The Petition Officer shall be another Presiding Officer, not otherwise involved in the case. Notice of this assignment shall be sent to the parties, and to the Presiding Officer.

(iv) Within 30 days of assignment of the Petition Officer, the complainant shall present to the Petition Officer a copy of the complaint and a written response to the petition. A copy of the response shall be provided to the parties and to the commenter, but not to the Regional Hearing Clerk or Presiding Officer.

(v) The Petition Officer shall review the petition, and complainant's response, and shall file with the Regional Hearing Clerk, with copies to the parties, the commenter, and the Presiding Officer, written findings as to:

(A) The extent to which the petition states an issue relevant and material to the issuance of the proposed final order;

(B) Whether complainant adequately considered and responded to the petition; and

(C) Whether a resolution of the proceeding by the parties is appropriate without a hearing.

(vi) Upon a finding by the Petition Officer that a hearing is appropriate, the Presiding Officer shall order that the consent agreement and proposed final order be set aside and shall establish a schedule for a hearing.

(vii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Petition Officer shall issue an order denying the petition and stating reasons for the denial. The Petition Officer shall:

(A) File the order with the Regional Hearing Clerk;

(B) Serve copies of the order on the parties and the commenter; and

(C) Provide public notice of the order.

(viii) Upon a finding by the Petition Officer that a resolution of the proceeding without a hearing is appropriate, the Regional Administrator may issue the proposed final order, which shall become final 30 days after both the order denying the petition and a properly signed consent agreement are filed with the Regional Hearing Clerk, unless further petition for review is filed by a notice of appeal in the appropriate United States District

CLEAN AIR ACT

STATIONARY SOURCE

CIVIL PENALTY POLICY

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CLEAN AIR ACT STATIONARY SOURCE CIVIL PENALTY POLICY

I. INTRODUCTION

Section 113(b) of the Clean Air Act, 42 U.S.C. § 7413(b), provides the Administrator of EPA with the authority to commence a civil action against certain violators to recover a civil penalty of up to $25,000 per day per violation. Since July 8, 1980, EPA has sought the assessment of civil penalties for Clean Air Act violations under Section 113(b) based on the considerations listed in the statute and the guidance provided in the Civil Penalty Policy issued on that date.

On February 16, 1984, EPA issued the Policy on Civil Penalties (GM-21) and a Framework for Statute-Specific Approaches to Penalty Assessments (GM-22). The Policy focuses on the general philosophy behind the penalty program. The Framework provides guidance to each program on how to develop medium-specific penalty policies. The Air Enforcement program followed the Policy and the Framework in drafting the Clean Air Act Stationary Source Civil Penalty Policy, which was issued on September 12, 1984, and revised March 25, 1987. This policy amends the March 25, 1987 revision, incorporating EPA's further experience in calculating and negotiating penalties. This guidance document governs only stationary source violations of the Clean Air Act. All violations of Title II of the Act are governed by separate guidance.

The Act was amended on November 15, 1990, providing the Administrator with the authority to issue administrative penalty orders in Section 113(d), 42 U.S.C. § 7413(d). These penalty orders may assess penalties of up to $25,000 per day of violation and are generally authorized in cases where the penalty sought is not over $200,000 and the first alleged date of violation occurred no more than 12 months prior to initiation of the administrative action. In an effort to provide consistent application of the Agency's civil penalty authorities, this penalty policy will serve as the civil penalty guidance used in calculating administrative penalties under Section 113(d) of the Act and will be used in calculating a minimum settlement amount in civil judicial cases brought under Section 113(b) of the Act.

In calculating the penalty amount which should be sought in an administrative complaint, the economic benefit of noncompliance and a gravity component should be calculated under this penalty policy using the most aggressive assumptions supportable. Pleadings will always include the full economy benefit component. As a general rule, the gravity component of the penalty plead in administrative complaints may not be mitigated. However, the gravity component portion of the plead penalty may be mitigated by up to ten per cent solely for degree of cooperation. Any mitigation for this factor must be justified under Section II.B.4.b. of this Policy. The total mitigation for good faith efforts to comply for purpose of

determining a settlement amount may never exceed thirty per cent. Applicable adjustment factors which aggravate the penalty must be included in the amount plead in the administrative complaint. Where key financial or cost figures are not available, for example those costs involved in calculating the BEN calculation, the highest figures supportable should be used.

This policy will ensure the penalty plead in the complaint is never lower than any revised penalty calculated later based on more detailed information. It will also encourage sources to provide the litigation team with the more accurate cost or financial information. The penalty may then be recalculated during negotiations where justified under this policy to reflect any appropriate adjustment factors. In administrative cases, where the penalty is recalculated based upon information received in negotiations or the prehearing exchange, the administrative complaint must be amended to reflect the new amount if the case is going to or expected to go to hearing. This will ensure the complaint reflects the amount the government is prepared to justify at the hearing. This pleading policy also fulfills the obligation of 40 C.F.R. § 22.14(a)(5) that all administrative complaints include "a statement explaining the reasoning behind the proposed penalty."

This policy reflects the factors enumerated in Section 113(e) that the court (in Section 113(b) actions) and the Administrator (in Section 113(d) actions) shall take into consideration in the assessment of any penalty. These factors include: the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation, payment by the violator of penalties assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation and such other factors as justice may require.

This document is not meant to control the penalty amount requested in judicial actions to enforce existing consent decrees.[1] In judicial cases, the use of this guidance is limited to pre-trial settlement of enforcement actions. In a trial, government attorneys may find it relevant and helpful to introduce a penalty calculated under this policy, as a point of reference in a demand for penalties. However, once a case goes to trial, government attorneys should demand a larger penalty than the minimum settlement figure as calculated under the policy.

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[1] In these actions, EPA will normally seek the penalty amount dictated by the stipulated penalty provisions of the consent decree. If a consent decree contains no stipulated penalty provisions, the case development team should propose penalties suitable to vindicate the authority of the Court.

The general policy applies to most Clean Air Act violations. There are some types of violations, however, that have characteristics which make the use of the general policy inappropriate. These are treated in separate guidance, included as appendices. Appendix I covers violations of PSD/NSR permit requirements. Appendix II deals with the gravity component for vinyl chloride NESHAP violations. Appendix III covers the economic benefit and gravity components for asbestos NESHAP demolition and renovation violations. The general policy applies to violations of volatile organic compound regulations where the method of compliance involves installation of control equipment. Separate guidance is provided for VOC violators which comply through reformulation (Appendix IV). Appendix VI deals with the gravity component for volatile hazardous air pollutants violations. Appendix VII covers violations of the residential wood heaters NSPS regulations. Violations of the regulations to protect stratospheric ozone are covered in Appendix VIII. These appendixes specify how the gravity component and/or economic benefit components will be calculated for these types of violations. Adjustment, aggravation or mitigation, of penalties calculated under any of the appendixes is governed by this general penalty policy.

This penalty policy contains two components. First, it describes how to achieve the goal of deterrence through a penalty that removes the economic benefit of noncompliance and reflects the gravity of the violation. Second, it discusses adjustment factors applied so that a fair and equitable penalty will result. The litigation team[2] should calculate the full economic benefit and gravity components and then decide whether any of the adjustment factors applicable to either component are appropriate. The final penalty obtained should never be lower than the penalty calculated under this policy taking into account all appropriate adjustment factors including litigation risk and inability to pay.

All consent agreements should state that penalties paid pursuant to this penalty policy are not deductible for federal tax purposes under 28 U.S.C. § 162(f).

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[2] With respect to civil judicial cases, the litigation team will consist of the Assistant Regional Counsel, the Office of Enforcement attorney, the Assistant United States Attorney, the Department of Justice attorney from the Environmental Enforcement Section, and EPA technical professionals assigned to the case. With respect to administrative cases, the litigation team will generally consist of the EPA technical professional and Assistant Regional Counsel assigned to the case. The recommendation of the litigation team must be unanimous. If a unanimous position cannot be reached, the matter should be escalated and a decision made by EPA and the Department of Justice managers, as required.

The procedures set out in this document are intended solely for the guidance of government personnel. They are not intended and cannot be relied upon to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with this policy and to change it at any time without public notice.

This penalty policy is effective immediately with respect to all cases in which the first penalty offer has not yet been transmitted to the opposing party.

II. THE PRELIMINARY DETERRENCE AMOUNT

The February 16, 1984, Policy on Civil Penalties establishes deterrence as an important goal of penalty assessment. More specifically, it says that any penalty should, at a minimum, remove any significant economic benefit resulting from noncompliance. In addition, it should include an amount beyond recovery of the economic benefit to reflect the seriousness of the violation. That portion of the penalty which recovers the economic benefit of noncompliance is referred to as the "economic benefit component;" that part of the penalty which reflects the seriousness of the violation is referred to as the "gravity component." When combined, these two components yield the "preliminary deterrence amount."

This section provides guidelines for calculating the economic benefit component and the gravity component. It will also discuss the limited circumstances which justify adjusting either component.

A. THE ECONOMIC BENEFIT COMPONENT

In order to ensure that penalties recover any significant economic benefit of noncompliance, it is necessary to have reliable methods to calculate that benefit. The existence of reliable methods also strengthens the Agency's position in both litigation and negotiation. This section sets out guidelines for computing the economic benefit component. It first addresses costs which are delayed by noncompliance. Then it addresses costs which are avoided completely by noncompliance. It also identifies issues to be considered when computing the economic benefit component for those violations where the benefit of noncompliance results from factors other than cost savings. The section concludes with a discussion of the limited circumstances where the economic benefit component may be mitigated.

1. Benefit from delayed costs

In many instances, the economic advantage to be derived from noncompliance is the ability to delay making the expenditures necessary to achieve compliance. For example, a facility which

fails to install a scrubber will eventually have to spend the money needed to install the scrubber in order to achieve compliance. But, by deferring these capital costs until EPA or a State takes an enforcement action, that facility has achieved an economic benefit. Among the types of violations which may result in savings from deferred cost are the following:

- Failure to install equipment needed to meet emission control standards.
- Failure to effect process changes needed to reduce pollution.
- Failure to test where the test still must be performed.
- Failure to install required monitoring equipment.

The economic benefit of delayed compliance should be computed using the "Methodology for Computing the Economic Benefit of Noncompliance," which is Technical Appendix A of the BEN User's Manual. This document provides a method for computing the economic benefit of noncompliance based on a detailed economic analysis. The method is a refined version of the method used in the previous Civil Penalty Policy issued July 8, 1980, for the Clean Water Act and the Clean Air Act. BEN is a computer program available to the Regions for performing the analysis. Questions concerning the BEN model should be directed to the Program Development and Training Branch in the Office of Enforcement, FTS 475-6777.

2. Benefit from avoided costs

Many types of violations enable a violator to avoid permanently certain costs associated with compliance. These include cost savings for:

- Disconnecting or failing to properly operate and maintain existing pollution control equipment (or other equipment if it affects pollution control).
- Failure to employ a sufficient number of adequately trained staff.
- Failure to establish or follow precautionary methods required by regulations or permits.
- Removal of pollution equipment resulting in process, operational, or maintenance savings.
- Failure to conduct a test which is no longer required.

- Disconnecting or failing to properly operate and maintain required monitoring equipment.

- Operation and maintenance of equipment that the violator failed to install.

The benefit from avoided costs must also be computed using methodology in Technical Appendix A of the BEN User's Manual.

The benefit from delayed and avoided costs is calculated together, using the BEN computer program, to arrive at an amount equal to the economic benefit of noncompliance for the period from the first provable date of violation until the date of compliance.

As noted above, the BEN model may be used to calculate only the economic benefit accruing to a violator through delay or avoidance of the costs of complying with applicable requirements of the Clean Air Act and its implementing regulations. There are instances in which the BEN methodology either cannot compute or will fail to capture the actual economic benefit of noncompliance. In those instances, it will be appropriate for the Agency to include in its penalty analysis a calculation of the economic benefit in a manner other than that provided for in the BEN methodology.

In some instances this may include calculating and including in the economic benefit component profits from illegal activities. An example would be a source operating without a preconstruction review permit under PSD/NSR regulations or without an operating permit under Title V. In such a case, an additional calculation would be performed to determine the present value of these illegal profits which would be added to the BEN calculation for the total economic benefit component. Care must be taken to account for the preassessed delayed or avoided costs included in the BEN calculation when calculating illegal profits. Otherwise, these costs could be assessed twice. The delayed or avoided costs already accounted for in the BEN calculation should be subtracted from any calculation of illegal profits.

3. Adjusting the Economic Benefit Component

As noted above, settling for an amount which does not recover the economic benefit of noncompliance can encourage people to wait until EPA or the State begins an enforcement action before complying. For this reason, it is general Agency policy not to adjust or mitigate this amount. There are three general circumstances (described below) in which mitigating the economic benefit component may be appropriate. However, in any individual case where the Agency decides to mitigate the economic benefit component, the litigation team must detail those reasons in the case file and in any memoranda accompanying the settlement.

Following are the limited circumstances in which EPA can mitigate the economic benefit component of the penalty:

a. Economic benefit component involves insignificant amount

Assessing the economic benefit component and subsequent negotiations will often represent a substantial commitment of resources. Such a commitment may not be warranted in cases where the magnitude of the economic benefit component is not likely to be significant because it is not likely to have substantial financial impact on the violator. For this reason, the litigation team has the discretion not to seek the economic benefit component where it is less than $5,000. In exercising that discretion, the litigation team should consider the following factors:

- Impact on violator: The likelihood that assessing the economic benefit component as part of the penalty will have a noticeable effect on the violator's competitive position or overall profits. If no such effect appears likely, the benefit component should probably not be pursued.

- The size of the gravity component: If the gravity component is relatively small, it may not provide a sufficient deterrent, by itself, to achieve the goals of this policy. In situations like this, the litigation team should insist on including the economic benefit component in order to develop an adequate penalty.

b. Compelling public concerns

The Agency recognizes that there may be some instances where there are compelling public concerns that would not be served by taking a case to trial. In such instances, it may become necessary to consider mitigating the economic benefit component. This may be done only if it is absolutely necessary to preserve the countervailing public interests. Such settlement might be appropriate where the following circumstances occur:

- The economic benefit component may be mitigated where recovery would result in plant closings, bankruptcy, or other extreme financial burden, and there is an important public interest in allowing the firm to continue in business. Alternative payment plans, such as installment payments with interest, should be fully explored before resorting to this option. Otherwise, the Agency will give the perception that shirking one's environmental responsibilities is a way to keep a failing enterprise afloat. This exemption does not apply to situations where the plant was likely to close anyway, or where

there is a likelihood of continued harmful noncompliance.

The economic benefit component may also be mitigated in enforcement actions against nonprofit public entities, such as municipalities and publicly-owned utilities, where assessment threatens to disrupt continued provision of essential public services.

c. Concurrent Section 120 administrative action

EPA will not usually seek to recover the economic benefit of noncompliance from one violation under both a Section 113(b) civil judicial action or 113(d) civil administrative action and a Section 120 action. Therefore, if a Section 120 administrative action is pending or has been concluded against a source for a particular violation and an administrative or judicial penalty settlement amount is being calculated for the same violation, the economic benefit component need not include the period of noncompliance covered by the Section 120 administrative action.

In these cases, although the Agency will not usually seek double recovery, the litigation team should not automatically mitigate the economic benefit component by the amount assessed in the Section 120 administrative action. The Clean Air Act allows dual recovery of the economic benefit, and so each case must be considered on its individual merits. The Agency may mitigate the economic benefit component in the administrative or judicial action if the litigation team determines such a settlement is equitable and justifiable. The litigation team should consider in making this decision primarily whether the penalty calculated without the Section 120 noncompliance penalty is a sufficient deterrent.

B. THE GRAVITY COMPONENT

As noted above, the Policy on Civil Penalties specifies that a penalty, to achieve deterrence, should recover any economic benefit of noncompliance, and should also include an amount reflecting the seriousness of the violation. Section 113(e) instructs courts to take into consideration in setting the appropriate penalty amount several factors including the size of the business, the duration of the violation, and the seriousness of the violation. These factors are reflected in the "gravity component." This section of the policy establishes an approach to quantifying the gravity component.

Assigning a dollar figure to represent the gravity of the violation is a process which must, of necessity, involve the consideration of a variety of factors and circumstances. Linking the dollar amount of the gravity component to these objective factors is a useful way of insuring that violations of approximately equal seriousness are treated the same way. These

objective factors are designed to reflect those listed in Section 113(e) of the Act.

The specific objective factors in this civil penalty policy designed to measure the seriousness of the violation and reflect the considerations listed in the Clean Air Act are as follows:

- Actual or possible harm: This factor focuses on whether (and to what extent) the activity of the defendant actually resulted or was likely to result in the emission of a pollutant in violation of the level allowed by an applicable State Implementation Plan, federal regulation or permit.

- Importance to the regulatory scheme: This factor focuses on the importance of the requirement to achieving the goals of the Clean Air Act and its implementing regulations. For example, the NSPS regulations require owners and operators of new sources to conduct emissions testing and report the results within a certain time after start-up. If a source owner or operator does not report the test results, EPA would have no way of knowing whether that source is complying with NSPS emissions limits.

- Size of violator: The gravity component should be increased, in proportion to the size of the violator's business.

The assessment of the first gravity component factor listed above, actual or possible harm arising from a violation, is a complex matter. For purposes of determining how serious a given violation is, it is possible to distinguish violations based on certain considerations, including the following:

- Amount of pollutant: Adjustments based on the amount of the pollutant emitted are appropriate.

- Sensitivity of the environment: This factor focuses on where the violation occurred. For example, excessive emissions in a nonattainment area are usually more serious than excessive emissions in an attainment area.

- Toxicity of the pollutant: Violations involving toxic pollutants regulated by a National Emissions Standard for Hazardous Air Pollutants (NESHAP) or listed under Section 112(b)(1) of the Act are more serious and should result in larger penalties.

- The length of time a violation continues: Generally, the longer a violation continues uncorrected, the greater the risk of harm.

- Size of violator: A corporation's size is indicated by its stockholders' equity or "net worth." This value, which is calculated by adding the value of capital stock, capital surplus, and accumulated retained earnings, corresponds to the entry for "worth" in the Dun and Bradstreet reports for publicly traded corporations. The simpler bookkeeping methods employed by sole proprietorships and partnerships allow determination of their size on the basis of net current assets. Net current assets are calculated by subtracting current liabilities from current assets.

The following dollar amounts assigned to each factor should be added together to arrive at the total gravity component:

1. Actual or possible harm

a. Level of violation

Percent Above Standard[3]	Dollar Amount
1 - 30%	$ 5,000
31 - 60%	10,000
61 - 90%	15,000
91 - 120%	20,000
121 - 150%	25,000
151 - 180%	30,000
181 - 210%	35,000
211 - 240%	40,000
241 - 270%	45,000
271 - 300%	50,000
over 300%	50,000 + $5,000 for each 30% or fraction of 30% increment above the standard

This factor should be used only for violations of emissions standards. Ordinarily the highest documented level of violation should be used. If that level, in the opinion of the litigation team, is not representative of the period of violation, then a more representative level of violation may be used. This figure should be assessed for each emissions violation. For example, if a source which emits particulate matter is subject to both an opacity standard and a mass emission standard and is in violation of both standards, this figure should be assessed for both violations.

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[3] Compliance is equivalent to 0% above the emission standard.

b. Toxicity of the pollutant

Violations of NESHAPs emission standards not handled by a separate appendix and non-NESHAP emission violations involving pollutants listed in Section 112(b)(1) of the Clean Air Act Amendments of 1990[4]: $15,000 for each hazardous air pollutant for which there is a violation.

c. Sensitivity of environment (for SIP and NSPS cases only).

The penalty amount selected should be based on the status of the air quality control district in question with respect to the pollutant involved in the violation.

1. Nonattainment Areas

i. Ozone:

Extreme	$18,000
Severe	16,000
Serious	14,000
Moderate	12,000
Marginal	10,000

ii. Carbon Monoxide and Particulate Matter:

Serious	$14,000
Moderate	12,000

iii. All Other Criteria Pollutants: $10,000

2. Attainment area PSD Class I: $ 10,000

3. Attainment area PSD Class II or III: $ 5,000

d. Length of time of violation

To determine the length of time of violation for purposes of calculating a penalty under this policy, violations should be assumed to be continuous from the first provable date of violation until the source demonstrates compliance if there have been no significant process or operational changes. If the source has affirmative evidence, such as continuous emission monitoring data,

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[4] An example of a non-NESHAP violation involving a hazardous air pollutant would be a violation of a volatile organic compound (VOC) standard in a State Implementation Plan involving a VOC contained in the Section 112(b)(1) list of pollutants for which no NESHAP has yet been promulgated.

to show that the violation was not continuous, appropriate adjustments should be made. In determining the length of violation, the litigation team should take full advantage of the presumption regarding continuous violation in Section 113(e)(2). This figure should be assessed separately for each violation, including procedural violations such as monitoring, recordkeeping and reporting violations. For example, if a source violated an emissions standard, a testing requirement, and a reporting requirement, three separate length of violation figures should be assessed, one for each of the three violations based on how long each was violated.

Months	Dollars
0 - 1	$ 5,000
2 - 3	8,000
4 - 6	12,000
7 - 12	15,000
13 - 18	20,000
19 - 24	25,000
25 - 30	30,000
31 - 36	35,000
37 - 42	40,000
43 - 48	45,000
49 - 54	50,000
55 - 60	55,000

2. Importance to the regulatory scheme

The following violations are also very significant in the regulatory scheme and therefore require the assessment of the following penalties:

Work Practice Standard Violations:
- failure to perform a work practice requirement: $10,000-15,000
(See Appendix III for Asbestos NESHAP violations.)

Reporting and Notification Violations:
- failure to report or notify: $15,000
- late report or notice: $5,000
- incomplete report or notice: $5,000 - $15,000
(See Appendix III for Asbestos NESHAP violations.)

Recordkeeping Violations:
- failure to keep required records: $15,000
- incomplete records: $5,000 - $15,000

Testing Violations:
- failure to conduct required performance testing or testing using an improper test method: $15,000
- late performance test or performing a required test method using an incorrect procedure: $5,000

Permitting Violations:
- failure to obtain an operating permit: $15,000
- failure to pay permit fee: See Section 502(b)(3)(C)(ii) of the Act

Emission Control Equipment Violations:
- failure to operate and maintain control equipment required by the Clean Air Act, its implementing regulations or a permit: $15,000
- intermittent or improper operation or maintenance of control equipment: $5,000-15,000

Monitoring Violations:
- failure to install monitoring equipment required by the Clean Air Act, its implementing regulations or a permit: $15,000
- late installation of required monitoring equipment: $5,000
- failure to operate and maintain required monitoring equipment: $15,000

Violations of Administrative Orders[5]: $15,000

Section 114 Requests for Information Violations:
- failure to respond: $15,000
- incomplete response: $5,000 - $15,000

Compliance Certification Violations:
- failure to submit a certification: $15,000
- late certifications: $5,000
- incomplete certifications: $5,000 - $15,000

Violations of Permit Schedules of Compliance:
- failure to meet interim deadlines: $5,000
- failure to submit progress reports: $15,000
- incomplete progress reports: $5,000 - $15,000
- late progress reports: $5,000

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[5] This figure should be assessed even if the violation of the administrative order is also a violation of another requirement of the Act, for example a NESHAP or NSPS requirement. In this situation, the figure for violation of the administrative order is in addition to appropriate penalties for violating the other requirement of the Act.

A penalty range is provided for work practice violations to allow Regions some discretion depending on the severity of the violation. Complete disregard of work practice requirements should be assessed the full $15,000 penalty. Penalty ranges are provided for incomplete notices, reports, and recordkeeping to allow the Regions some discretion depending on the seriousness of the omissions and how critical they are to the regulatory program. If the source omits information in notices, reports or records which document the source's compliance status, this omission should be treated as a failure to meet the requirement and assessed $15,000.

A late notice, report or test should be considered a failure to notify, report or test if the notice or report is submitted or the test is performed after the objective of the requirement is no longer served. For example, if a source is required to submit a notice of a test so that EPA may observe the test, a notice received after the test is performed would be considered a failure to notify.

Each separate violation under this section should be assessed the corresponding penalty. For example, a NSPS source may be required to notify EPA at startup and be subject to a separate quarterly reporting requirement thereafter. If the source fails to submit the initial start-up notice and violates the subsequent reporting requirement, then the source should be assessed $15,000 under this section for each violation. In addition, a length of violation figure should be assessed for each violation based on how long each has been violated. Also, a figure reflecting the size of the violator should be assessed once for the case as a whole. If, however, the source violates the same reporting requirement over a period of time, for example by failing to submit quarterly reports for one year, the source should be assessed one $15,000 penalty under this section for failure to submit a report. In addition, a length of violation figure of $15,000 for 12 months of violation and a size of the violator figure should be assessed.

3. Size of the violator

Net worth (corporations); or net current assets (partnerships and sole proprietorships):

Under $100,000	$2,000
$100,001 - $1,000,000	5,000
1,000,001 - 5,000,000	10,000
5,000,001 - 20,000,000	20,000
20,000,001 - 40,000,000	35,000
40,000,001 - 70,000,000	50,000
70,000,001 - 100,000,000	70,000
Over 100,000,000	70,000 + $25,000 for every additional $30,000,000 or fraction thereof

In the case of a company with more than one facility, the size of the violator is determined based on the company's entire operation, not just the violating facility. With regard to parent and subsidiary corporations, only the size of the entity sued should be considered. Where the size of the violator figure represents over 50% of the total preliminary deterrence amount, the litigation team may reduce the size of the violator figure to 50% of the preliminary deterrence amount.

The process by which the gravity component was computed must be memorialized in the case file. Combining the economic benefit component with the gravity component yields the preliminary deterrence amount.

4. Adjusting the Gravity Component

The second goal of the Policy on Civil Penalties is the equitable treatment of the regulated community. One important mechanism for promoting equitable treatment is to include the economic benefit component discussed above in a civil penalty assessment. This approach prevents violators from benefitting economically from their noncompliance relative to parties which have complied with environmental requirements.

In addition, in order to promote equity, the system for penalty assessment must have enough flexibility to account for the unique facts of each case. Yet it still must produce consistent enough results to ensure similarly-situated violators are treated similarly. This is accomplished by identifying many of the legitimate differences between cases and providing guidelines for how to adjust the gravity component amount when those facts occur. The application of these adjustments to the gravity component prior to the commencement of negotiation yields the initial minimum settlement amount. During the course of negotiation, the litigation team may further adjust this figure based on new information learned during negotiations and discovery to yield the adjusted minimum settlement amount.

The purpose of this section is to establish adjustment factors which promote flexibility while maintaining national consistency. It sets guidelines for adjusting the gravity component which account for some factors that frequently distinguish different cases. Those factors are: degree of willfulness or negligence, degree of cooperation, history of noncompliance, and environmental damage. These adjustment factors apply only to the gravity component and not to the economic benefit component. Violators bear the burden of justifying mitigation adjustments they propose. The gravity component may be mitigated only for degree of

cooperation as specified in II.B.4.b. The gravity component may be aggravated by as much as 100% for the other factors discussed below: degree of willfulness or negligence, history of noncompliance, and environmental damage.

The litigation team is required to base any adjustment of the gravity component on the factors mentioned and to carefully document the reasons justifying its application in the particular case. The entire litigation team must agree to any adjustments to the preliminary deterrence amount. Members of the litigation team are responsible for ensuring their management also agrees with any adjustments to the penalty proposed by the litigation team.

a. Degree of Willfulness or Negligence

This factor may be used only to raise a penalty. The Clean Air Act is a strict liability statute for civil actions, so that willfulness, or lack thereof, is irrelevant to the determination of legal liability. However, this does not render the violator's willfulness or negligence irrelevant in assessing an appropriate penalty. Knowing or willful violations can give rise to criminal liability, and the lack of any negligence or willfulness would indicate that no addition to the penalty based on this factor is appropriate. Between these two extremes, the willfulness or negligence of the violator should be reflected in the amount of the penalty.

In assessing the degree of willfulness or negligence, all of the following points should be considered:

- The degree of control the violator had over the events constituting the violation.
- The foreseeability of the events constituting the violation.
- The level of sophistication within the industry in dealing with compliance issues or the accessibility of appropriate control technology (if this information is readily available). This should be balanced against the technology-forcing nature of the statute, where applicable.
- The extent to which the violator in fact knew of the legal requirement which was violated.

b. Degree of Cooperation

The degree of cooperation of the violator in remedying the violation is an appropriate factor to consider in adjusting the penalty. In some cases, this factor may justify aggravation of the

gravity component because the source is not making efforts to come into compliance and is negotiating with the agency in bad faith or refusing to negotiate. This factor may justify mitigation of the gravity component in the circumstances specified below where the violator institutes comprehensive corrective action after discovery of the violation. Prompt correction of violations will be encouraged if the violator clearly sees that it will be financially disadvantageous to litigate without remedying noncompliance. EPA expects all sources in violation to come into compliance expeditiously and to negotiate in good faith. Therefore, mitigation based on this factor is limited to no more than 30% of the gravity component and is allowed only in the following three situations:

1. Prompt reporting of noncompliance

The gravity component may be mitigated when a source promptly reports its noncompliance to EPA or the state or local air pollution control agency where there is no legal obligation to do so.

2. Prompt correction of environmental problems

The gravity component may also be mitigated where a source makes extraordinary efforts to avoid violating an imminent requirement or to come into compliance after learning of a violation. Such efforts may include paying for extra work shifts or a premium on a contract to have control equipment installed sooner or shutting down the facility until it is operating in compliance.

3. Cooperation during pre-filing investigation

Some mitigation may also be appropriate in instances where the defendant is cooperative during EPA's pre-filing investigation of the source's compliance status or a particular incident.

c. History of Noncompliance

This factor may be used only to raise a penalty. Evidence that a party has violated an environmental requirement before clearly indicates that the party was not deterred by a previous governmental enforcement response. Unless one of the violations was caused by factors entirely out of the control of the violator, the penalty should be increased. The litigation team should check for and consider prior violations under all environmental statutes enforced by the Agency in determining the amount of the adjustment to be made under this factor.

In determining the size of this adjustment, the litigation team should consider the following points:

- Similarity of the violation in question to prior violations.

- Time elapsed since the prior violation.
- The number of prior violations.
- Violator's response to prior violation(s) with regard to correcting the previous problem and attempts to avoid future violations.
- The extent to which the gravity component has already been increased due to a repeat violation. (For example, under the Asbestos Demolition and Renovation Penalty Policy in Appendix III.)

A violation should generally be considered "similar" if a previous enforcement response should have alerted the party to a particular type of compliance problem. Some facts indicating a "similar violation" are:

- Violation of the same permit.
- Violation of the same emissions standard.
- Violation at the same process points of a source.
- Violation of the same statutory or regulatory provision.
- A similar act or omission.

For purposes of this section, a "prior violation" includes any act or omission resulting in a State, local, or federal enforcement response (e.g., notice of violation, warning letter, administrative order, field citation, complaint, consent decree, consent agreement, or administrative and judicial order) under any environmental statute enforced by the Agency unless subsequently dismissed or withdrawn on the grounds that the party was not liable. It also includes any act or omission for which the violator has previously been given written notification, however informal, that the regulating agency believes a violation exists. In researching a defendant's compliance history, the litigation team should check to see if the defendant has been listed pursuant to Section 306 of the Act.

In the case of large corporations with many divisions or wholly-owned subsidiaries, it is sometimes difficult to determine whether a prior violation by the parent corporation should trigger the adjustments described in this section. New ownership often raises similar problems. In making this determination, the litigation team should ascertain who in the organization exercised or had authority to exercise control or oversight responsibility over the violative conduct. Where the parent corporation exercised or had authority to exercise control over the violative conduct,

the parent corporation's prior violations should be considered part of the subsidiary or division's compliance history.

In general, the litigation team should begin with the assumption that if the same corporation was involved, the adjustment for history of noncompliance should apply. In addition, the team should be wary of a party changing operations or shifting responsibility for compliance to different groups as a way of avoiding increased penalties. The Agency may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate-wide indifference to environmental protection. Consequently, the adjustment for history of noncompliance should apply unless the violator can demonstrate that the other violating corporate facilities are under totally independent control.

d. Environmental Damage

Although the gravity component already reflects the amount of environmental damage a violation causes, the litigation team may further increase the gravity component based on severe environmental damage. As calculated, the gravity component takes into account such factors as the toxicity of the pollutant, the attainment status of the area of violation, the length of time the violation continues, and the degree to which the source has exceeded an emission limit. However, there may be cases where the environmental damage caused by the violation is so severe that the gravity component alone is not a sufficient deterrent, for example, a significant release of a toxic air pollutant in a populated area. In these cases, aggravation of the gravity component may be warranted.

III. LITIGATION RISK

The preliminary deterrence amount, both economic benefit and gravity components, may be mitigated in appropriate circumstances based on litigation risk. Several types of litigation risk may be considered. For example, regardless of the type of violations a defendant has committed or a particular defendant's reprehensible conduct, EPA can never demand more in civil penalties than the statutory maximum (twenty-five thousand dollars per day per violation). In calculating the statutory maximum, the litigation team should assume continuous noncompliance from the first date of provable violation (taking into account the five year statute of limitations) to the final date of compliance where appropriate, fully utilizing the presumption of Section 113(e)(2). When the penalty policy yields an amount over the statutory maximum, the litigation team should propose an alternative penalty which must be concurred on by their respective management just like any other penalty.

Other examples of litigation risks would be evidentiary problems, or an indication from the court, mediator, or Administrative Law Judge during settlement negotiations that he or she is prepared to recommend a penalty below the minimum settlement amount. Mitigation based on these concerns should consider the specific facts, equities, evidentiary issues or legal problems pertaining to a particular case as well as the credibility of government witnesses.

Adverse legal precedent which the defendant argues is indistinguishable from the current enforcement action is also a valid litigation risk. Cases raising legal issues of first impression should be carefully chosen to present the issue fairly in a factual context the Agency is prepared to litigate. Consequently in such cases, penalties should generally not be mitigated due to the risk the court may rule against EPA. If an issue of first impression is litigated and EPA's position is upheld by the court, the mitigation was not justified. If EPA's position is not upheld, it is generally better that the issue be decided than to avoid resolution by accepting a low penalty. Mitigation based on litigation risk should be carefully documented and explained in particular detail. In judicial cases this should be done in coordination with the Department of Justice.

IV. ABILITY TO PAY

The Agency will generally not request penalties that are clearly beyond the means of the violator. Therefore, EPA should consider the ability to pay a penalty in adjusting the preliminary deterrence amount, both gravity component and economic benefit component. At the same time, it is important that the regulated community not see the violation of environmental requirements as a way of aiding a financially-troubled business. EPA reserves the option, in appropriate circumstances, of seeking a penalty that might contribute to a company going out of business.

For example, it is unlikely that EPA would reduce a penalty where a facility refuses to correct a serious violation. The same could be said for a violator with a long history of previous violations. That long history would demonstrate that less severe measures are ineffective.

The litigation team should assess this factor after commencement of negotiations only if the source raises it as an issue and only if the source provides the necessary financial information to evaluate the source's claim. The source's ability to pay should be determined according to the December 16, 1986 Guidance on Determining a Violator's Ability to Pay a Civil Penalty (GM-56) along with any other appropriate means.

The burden to demonstrate inability to pay, as with the burden of demonstrating the presence of any other mitigating circumstances, rests on the defendant. If the violator fails to provide sufficient information, then the litigation team should disregard this factor in adjusting the penalty. The Office of Enforcement Policy has developed the capability to assist the Regions in determining a firm's ability to pay. This is done through the computer program, ABEL. If ABEL indicates that the source may have an inability to pay, a more detailed financial analysis verifying the ABEL results should be done prior to mitigating the penalty.

Consider delayed payment schedule with interest: When EPA determines that a violator cannot afford the penalty prescribed by this policy, the next step is to consider a delayed payment schedule with interest. Such a schedule might even be contingent upon an increase in sales or some other indicator of improved business. EPA's computer program, ABEL, can calculate a delayed payment amount for up to five years.

Consider straight penalty reductions as a last recourse: If this approach is necessary, the reasons for the litigation team's conclusion as to the size of the necessary reduction should be carefully documented in the case file.*

Consider joinder of a corporate violator's individual owners: This is appropriate if joinder is legally possible and justified under the circumstances. Joinder is not legally possible for SIP cases unless the prerequisite of Section 113 of the Clean Air Act has been met -- issuance of an NOV to the person.

Regardless of the Agency's determination of an appropriate penalty amount to pursue based on ability to pay considerations, the violator is always expected to comply with the law.

V. OFFSETTING PENALTIES PAID TO STATE AND LOCAL GOVERNMENTS OR CITIZEN GROUPS FOR THE SAME VIOLATIONS

Under Section 113(e)(1), the court in a civil judicial action or the Administrator in a civil administrative action must consider in assessing a penalty "payment by the violator of penalties previously assessed for the same violation." While EPA will not automatically subtract any penalty amount paid by a source to a State or local agency in an enforcement action or to a citizen

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* If a firm fails to pay the agreed to penalty in a final administrative or judicial order, then the Agency must follow the procedures outlined in the February 6, 1990 Manual on Monitoring and Enforcing Administrative and Judicial Orders for collecting the penalty amount.

group in a citizen suit for the same violation that is the basis for EPA's enforcement action, the litigation team may do so if circumstances suggest that it is appropriate. The litigation team should consider primarily whether the remaining penalty is a sufficient deterrent.

VI. SUPPLEMENTAL ENVIRONMENTAL PROJECTS

The February 12, 1991 Policy on the Use of Supplemental Environmental Projects in EPA Settlements must be followed when reducing a penalty for such a project in any Clean Air Act settlement.

VII. CALCULATING A PENALTY IN CASES WITH MORE THAN ONE TYPE OF VIOLATION

EPA often takes an enforcement action against a stationary source for more than one type of violation of the Clean Air Act. The economic benefit of noncompliance with all requirements violated should be calculated. Next, the gravity component factors under actual or possible harm and importance to the regulatory scheme which are applicable should be calculated separately for each violation. The size of the violator factor should be figured only once for all violations.

For example, consider the case of a plant which makes laminated particle board. The particle board plant is found to emit particulates in violation of the SIP particulate emission limit and the laminating line which laminates the particle board with a vinyl covering is found to emit volatile organic compounds in violation of the SIP VOC emission limit. The penalty for the particulate violation should be calculated figuring the economic benefit of not complying with that limit (capital cost of particulate control, etc., determined by running the BEN computer model), and then the gravity component for this violation should be calculated using all the factors in the penalty policy. After the particulate violation penalty is determined, the VOC violation should be calculated as follows: the economic benefit should be calculated if additional measures need to be taken to comply with the VOC limit. In addition, a gravity component should be calculated for the VOC violation using all the applicable factors under actual or possible harm and importance to the regulatory scheme. The size of the violator factor should be figured only once for both violations.

Another example would be a case where, pursuant to Section 114, EPA issues a request for information to a source which emits SO_2, such as a coal-burning boiler. The source does not respond. Two months later, EPA issues an order under Section 113(a) requiring the source to comply with the Section 114 letter. The source does not respond. Three months later, EPA inspects the source and determines that the source is violating the SIP SO_2 emission limit.

In this case, separate economic benefits should be calculated, if applicable. Thus, if the source obtained any economic benefit from not responding to the Section 114 letter or obeying the Section 113(a) order, that should be calculated. If not, only the economic benefit from the SO_2 emission violation should be calculated using the BEN computer model. In determining the gravity component, the penalty should be calculated as follows:

1. Actual or possible harm

   a. level of violation - calculate for the emission violation only

   b. toxicity of pollutant - applicable to the emission violation only

   c. sensitivity of environment - applicable to the emission violation only

   d. length of time of violation - separately calculate the time for all three violations. Note the Section 114 violation continues to run even after the Section 113(a) order is issued until the Section 114 requirements are satisfied.

2. Importance to regulatory scheme

   Section 114 request for information violation - $15,000
   Section 113 administrative order violation - $15,000

3. Size of violator

   a. One figure based on the source's assets.

VIII. APPORTIONMENT OF THE PENALTY AMONG MULTIPLE DEFENDANTS

This policy is intended to yield a minimum settlement penalty figure for the case as a whole. In many cases, there may be more than one defendant. In such instances, the Government should generally take the position of seeking a sum for the case as a whole, which the defendants allocate among themselves. Civil

violations of the Clean Air Act are strict liability violations and it is generally not in the government's interest to get into discussions of the relative fault of the individual defendants. The government should therefore adopt a single settlement figure for the case and should not reject a settlement consistent with the bottom line settlement figure because of the way the penalty is allocated.

Apportionment of the penalty in a multi-defendant case may be required if one party is willing to settle and others are not. In such circumstances, the government should take the position that if certain portions of the penalty are attributable to such party (such as economic benefit or aggravation due to prior violations), that party should pay those amounts and a reasonable portion of the amounts not directly assigned to any single party. If the case is settled as to one defendant, a penalty not less than the balance of the settlement figure for the case as a whole must be obtained from the remaining defendants.

There are limited circumstances where the Government may try to influence apportionment of the penalty. For example, if one party has a history of prior violations, the Government may try to assure that party pays the amount the gravity component has been aggravated due to the prior violations. Also, if one party is known to have realized all or most of the economic benefit, that party may be asked to pay that amount.

IX. EXAMPLES

Example 1

I. Facts:

Company A runs its manufacturing operations with power produced by its own coal-fired boilers[7]. The boilers are major sources of sulfur dioxide. The State Implementation Plan has a sulfur dioxide emission limitation for each boiler of .68 lbs. per million B.T.U. The boilers were inspected by EPA on March 19, 1989, and the SO_2 emission rate was 3.15 lbs. per million B.T.U for each boiler. A NOV was issued for the SO_2 violations on April 10, 1989. EPA again inspected Company A on June 2, 1989 and found the

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[7] Note that a penalty is assessed for the entire facility and not for each emission unit. In this example, the source has several boilers. However, the penalty figures are not multiplied by the number of boilers. The penalty is based on the violations at the facility as a whole, specifically the amount of pollutant factor and length of violation factor are assessed once based on the amount of excess emissions at the facility from all the boilers.

SO_2 emission rate to be unchanged. Company A had never installed any pollution control equipment on its boilers, even though personnel from the state pollution control agency had contacted Company A and informed it that the company was subject to state air pollution regulations. The state had issued an administrative order on September 1, 1988 for SO_2 emission violations at the same boilers. The order required compliance with applicable regulations, but Company A had never complied with the state order. Company A is located in a nonattainment area for sulfur oxides. Company A has net current assets of $760,000. Company A's response to an EPA Section 114 request for information documented the first provable day of violation of the emission standard as July 1, 1988.

II. Computation of penalty

A. Economic benefit component

EPA used the BEN computer model in the standard mode to calculate the economic benefit component. The economic benefit component calculated by the computer model was $243,500.

B. Gravity component

1. Actual or possible harm

a. Amount of pollutant: between 360-390% above standard - $65,000

b. Toxicity of pollutant: not applicable.

c. Sensitivity of the environment: nonattainment - $10,000

d. Length of time of violation: Measured from the date of first provable violation, July 1, 1988 to the date of final compliance under a consent decree, hypothetically December 1, 1991. (If consent decree or judgment order is filed at a later date, this element, as well as elements in the economic benefit component must be recalculated.) 41 mos. - $40,000

2. Importance to regulatory scheme.

No applicable violations.

3. Size of violator: net assets of $760,000 - $5,000.

$243,500 economic benefit component
+120,000 gravity component
$363,500 preliminary deterrence amount

C. Adjustment Factors

1. Degree of willfulness/negligence

Because Company A was on notice of its violations and, moreover, disregarded the state administrative order to comply with applicable regulations, the gravity component in this example should be aggravated by some percentage based on this factor.

2. Degree of Cooperation

No adjustments were made in the category because Company A did not meet the criteria.

3. History of noncompliance

The gravity component should be aggravated by some percentage for this factor because Company A violated the state order issued for the same violation.

Initial penalty figure: $353,500 preliminary deterrence amount plus adjustments for history of noncompliance and degree of willfulness or negligence.

Example 2:

I. Facts:

Company C, located in a serious nonattainment area for particulate matter, commenced construction in January 1988. It began its operations in April 1989. It runs a hot mix asphalt plant subject to the NSPS regulations at 40 C.F.R. Part 60, Subpart I. Subpart I requires that emissions of particulates not exceed 90 mg/dscm (.04 gr/dscf) nor exhibit 20% opacity or greater. General NSPS regulations require that a source owner or operator subject to a NSPS fulfill certain notification and recordkeeping functions (40 C.F.R. § 60.7), and conduct performance tests and submit a report of the test results (40 C.F.R. § 60.8).

Company C failed to notify EPA of: the date it commenced construction within 30 days after such date (February 1988)(40

C.F.R. § 60.7(a)(1)); the date of anticipated start-up between 30-60 days prior to such date (March, 1989)(40 C.F.R. § 60.7(a)(2)); or the date of actual start-up within 15 days after such date (April, 1989) (40 C.F.R. § 60.7(a)(3). Company C was required under 40 C.F.R. § 60.8(a) to test within 180 days of start-up, or by October 1989. The company finally conducted the required performance test in September 1990. The test showed the plant to be emitting 120 mg/dscm of particulates and to exhibit 30% opacity.

Company C did submit the required notices in November 1989 in response to a letter from EPA informing it that it was subject to NSPS requirements. It did negotiate with EPA after the complaint was filed in September 1991, and agreed to a consent decree requiring compliance by December 1, 1991. Company C has assets of $7,000,000.

II. Computation of penalty

A. Benefit component

The Region determined after calculation that the economic benefit component was $90,000 for violation of the emissions standard according to the BEN computer calculation. The litigation team determined that the economic benefit from the notice and testing requirement was less than $5,000. Therefore, the litigation team has discretion not to include this amount in the penalty consistent with the discussion at II.A.3.a.

B. Gravity component

1. Actual or possible harm

a. Amount of pollutant:

i. mass emission standard:
33% above standard - $10,000
ii. opacity standard:
50% over standard - $10,000

b. Toxicity of pollutant: not applicable

c. Sensitivity of the environment:
serious nonattainment - $14,000

d. Length of time of violation

1) Performance testing: October, 1989 - September 1990: 12 months - $15,000

2) Failure to report commencement of construction: February 1988 - November 1989: 21 months (date of EPA's first letter to Company) - $25,000

3) Failure to report actual start-up: April, 1989 - November 1989: 7 months - $15,000

4) Failure to report date of anticipated startup between 30-60 days prior to such date: March, 1989 - November 1989: 8 months - $15,000

5) Mass Emission Standard Violation: September 1990 - December 1991: 15 months - $20,000

6) Opacity Violation: September 1990 - December 1991: 15 months - $20,000

2. Importance to regulatory scheme:

Failure to notify 40 C.F.R. § 60.7(a)(1) - $15,000
Failure to notify 40 C.F.R. § 60.7(a)(2) - $15,000
Failure to notify 40 C.F.R. § 60.7(a)(3) - $15,000
Failure to conduct required performance test 40 C.F.R. § 60.8(a) - $15,000

3. Size of violator: Net current Assets - $7,000,000 - $20,000

$ 90,000 economic benefit component
224,000 gravity component
$314,000 preliminary deterrence amount

C. Adjustment factors

1. Degree of willfulness/negligence

No adjustments were made based on willfulness in this category because there was no evidence that Company C knew of the requirements prior to receiving the letter from EPA. Specific evidence may suggest that the company's violations were due to negligence justifying an aggravation of the penalty on that basis.

2. Degree of Cooperation

No adjustments were made in this category because Company C did not meet the criteria.

3. History of noncompliance

The gravity component should be aggravated by an amount agreed to by the litigation team for this factor because the source ignored two letters from EPA informing them of the requirements.

Example 3:

I. Facts

Chemical Inc. operates a mercury cell chlor-alkali plant which produces chlorine gas. The plant is subject to regulations under the National Emissions Standard for Hazardous Air Pollutants (NESHAP) for mercury, 40 C.F.R. Part 61, Subpart E. On September 9, 1990, EPA inspectors conducted an inspection of the facility, and EPA required the source to conduct a stack test pursuant to Section 114. The stack test showed emissions at a rate of 3000 grams of mercury per 24-hour period. The mercury NESHAP states that emissions from mercury cell chlor-alkali plants shall not exceed 2300 grams per 24-hour period. The facility has been in operation since June 1989.

In addition under 40 C.F.R. § 61.53, Chemical Inc. either had to test emissions from the cell room ventilation system within 90 days of the effective date of the NESHAP or follow specified approved design, maintenance and housekeeping practices. Chemical Inc. has never tested emissions. Therefore, it has committed itself to following the housekeeping requirements. At the inspection, EPA personnel noted the floors of the facility were badly cracked and mercury droplets were found in several of the cracks. The inspectors noted that the mercury in the floor cracks was caused by leaks from the hydrogen seal pots and compressor seals which housekeeping practices require be collected and confined for further processing to collect mercury. Chemical Inc. will have to install control equipment to come into compliance. A complaint was filed in June 1991. The equipment was installed and operational by June 1992. A consent decree was entered and penalty paid in February 1992. Chemical Inc. has a net corporate worth of $2,000,000.

II. Calculation of Penalty

A. Economic Benefit Component

The delay in installing necessary control equipment from June 1989 to June 1992 as calculated using the BEN computer model resulted in an economic benefit to Chemical Inc. of $35,000.

B. Gravity Component

1. Actual or possible harm

a. Amount of pollutant: 30 % above the standard - $5,000

b. Toxicity of pollutant : $15,000 for violations involving a NESHAP

c. Sensitivity of the environment: not applicable

d. Length of time of violation: Measured from first provable date of violation in September 1990 until June 1992 when the source will be in compliance. 22 mos. - $25,000

2. Importance to regulatory scheme.

Failure to perform work practice requirements - $15,000

3. Size of Violator: net worth of $2,000,000 - $10,000

$35,000 economic benefit component
+70,000 gravity component
$105,000 preliminary deterrence amount

C. Adjustment Factors

1. Degree of willfulness/negligence

It is unlikely Chemical Inc. would not be aware of the NESHAP requirements. Therefore, an adjustment should probably be made for this factor.

2. Degree of Cooperation

No adjustments made because Chemical Inc. did not meet the criteria.

3. History of Compliance

No adjustments were made because Chemical Inc. had no prior violations.

X. CONCLUSION

Treating similar situations in a similar fashion is central to the credibility of EPA's enforcement effort and to the success of achieving the goal of equitable treatment. This document has established several mechanisms to promote such consistency. Yet it still leaves enough flexibility for tailoring the penalty to particular circumstances. Perhaps the most important mechanisms for achieving consistency are the systematic methods for calculating the benefit component and gravity component of the penalty. Together, they add up to the preliminary deterrence amount. The document also sets out guidance on uniform approaches for applying adjustment factors to arrive at an initial amount prior to beginning settlement negotiations or an adjusted amount after negotiations have begun.

Nevertheless, if the Agency is to promote consistency, it is essential that each case file contain a complete description of how each penalty was developed as required by the August 9. 1990 Guidance on Documenting Penalty Calculations and Justifications in EPA Enforcement Actions. This description should cover how the preliminary deterrence amount was calculated and any adjustments made to the preliminary deterrence amount. It should also describe the facts and reasons which support such adjustments. Only through such complete documentation can enforcement attorneys, program staff and their managers learn from each other's experience and promote the fairness required by the Policy on Civil Penalties.

APPENDIX III

ASBESTOS DEMOLITION AND RENOVATION CIVIL PENALTY POLICY
Revised: May 5, 1992

The Clean Air Act Stationary Source Civil Penalty Policy ("General Penalty Policy") provides guidance for determining the amount of civil penalties EPA will seek in pre-trial settlement of civil judicial actions under Section 113 (b) of the Clean Air Act ("the Act"). In addition, the General Penalty Policy is used by the Agency in determining an appropriate penalty in administrative penalty actions brought under Section 113 (d)(1) of the Act. Due to certain unique aspects of asbestos demolition and renovation cases, this Appendix provides separate guidance for determining the gravity and economic benefit components of the penalty. Adjustment factors should be treated in accordance with the General Penalty Policy.

This Appendix is to be used for settlement purposes in civil judicial cases involving asbestos NESHAP demolition and renovation violations, but the Agency retains the discretion to seek the full statutory maximum penalty in all civil judicial cases which do not settle. In addition, for administrative penalty cases, the Appendix is to be used in conjunction with the General Penalty Policy to determine an appropriate penalty to be pled in the administrative complaint, as well as serving as guidance for settlement amounts in such cases. If the Region is referring a civil action under Section 113(b) against a demolition or renovation source, it should recommend a minimum civil penalty settlement amount in the referral. For administrative penalty cases under Section 113 (d)(1), the Region will plead the calculated penalty in its complaint. In both instances, consistent with the General Penalty Policy, the Region should determine a "preliminary deterrence amount" by assessing an economic benefit component and a gravity component. This amount may then be adjusted upward or downward by consideration of other factors, such as degree of willfulness and/or negligence, history of noncompliance,[1] ability to pay, and litigation risk.

The "gravity" component should account for statutory criteria such as the environmental harm resulting from the violation, the importance of the requirement to the regulatory

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[1] As discussed in the General Penalty Policy, history of noncompliance takes into account prior violations of all environmental statutes. In addition, the litigation team should consider the extent to which the gravity component has already been increased for prior violations by application of this Appendix.

scheme, the duration of the violation, and the size of the violator. Since asbestos is a hazardous air pollutant, the penalty policy generates an appropriately high gravity factor associated with substantive violations (i.e., failure to adhere to work practices or to prevent visible emissions from waste disposal). Also, since notification is essential to Agency enforcement, a notification violation may also warrant a high gravity component, except for minor violations as set forth in the chart for notification violations on page 15.

I. GRAVITY COMPONENT

The chart on pages 15-16 sets forth penalty amounts to be assessed for notification and waste shipment violations as part of the gravity component of the penalty settlement figure. The chart on page 17 sets forth a matrix for calculating penalties for work-practice, emission and other violations of the asbestos NESHAP.

A. Notice Violations

1. No Notice

The figures in the first line of the Notification and Waste Shipment Violations chart (pp. 15-16) apply as a general rule to failure to notify, including those situations in which substantive violations occurred and those instances in which EPA has been unable to determine if substantive violations occurred.

If EPA does not know whether substantive violations occurred, additional information, such as confirmation of the amount of asbestos in the facility obtained from owners, operators, or unsuccessful bidders, may be obtained by using section 114 requests for information or administrative subpoenas. If there has been a recent purchase of the facility, there may have been a pre-sale audit of environmental liabilities that might prove useful. Failure to respond to such a request should be assessed an additional penalty in accordance with the General Penalty Policy. The reduced amounts in the second line of the chart apply only if the Agency can conclude, from its own inspection, a State inspection, or other reliable information, that the source probably achieved compliance with all substantive requirements.

2. Late, Incomplete or Inaccurate Notice

Where notification is late, incomplete or inaccurate, the Region should use the figures in the chart, but has discretion to insert appropriate figures in circumstances not addressed in the matrix. The important factor is the impact the company's action has on the Agency's ability to monitor substantive compliance.

B. Work-Practice, Emission and Other Violations

Penalties for work-practice, emissions and other violations are based on the particular regulatory requirements violated. The figures on the chart (page 17) are for each day of documented violations, and each additional day of violation in the case of continuing violations. The total figure is the sum of the penalty assigned to a violation of each requirement. Apply the matrix for each distinct violation of sub-paragraphs of the regulation that would constitute a separate claim for relief if applicable (e.g.,§ 61.145(c)(6)(i), (ii), and (iii)).

The gravity component also depends on the amount of asbestos involved in the operation, which relates to the potential for environmental harm associated with improper removal and disposal. There are three categories based on the amount of asbestos, expressed in "units," a unit being the threshold for applicability of the substantive requirements.[2] If a job involves friable asbestos on pipes and other facility components, the amounts of linear feet and square feet should each be separately converted to units, and the numbers of units should be added together to arrive at a total. Where the only information on the amount of asbestos involved in a particular demolition or renovation is in cubic dimensions (volume), 35 cubic feet is the applicability limit which is specified in § 61.145(a)(1)(ii).

Where the facility has been reduced to rubble prior to the inspection, information on the amount of asbestos can be sought from the notice, the contract for removal or demolition, unsuccessful bidders, depositions of the owners and operators or maintenance personnel, or from blueprints if available. The Region may also make use of § 114 requests and § 307 subpoenas to gather information regarding the amount of asbestos at the facility. If the Region is unable to obtain specific information on the amount of asbestos involved at the site from the source, the Region should use the maximum unit range for which it has adequate evidence.

Where there is evidence indicating that only part of a demolition or renovation project involved improper stripping, removal, disposal or handling, the Region may calculate the number of units based upon the amount of asbestos reasonably related to such improper practice. For example, if improper

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[2] This applicability threshold is prescribed in 61.145(a)(1) as the combined amount of regulated-asbestos containing material (RACM) on at least 80 linear meters (260 linear feet) of pipes, or at least 15 square meters (160 square feet) on other facility components, or at least 1 cubic meter (35 cubic feet) off facility components.

removal is observed in one room of a facility, but it is apparent that the removal activities in the remainder of the facility are done in full compliance with the NESHAP, the Region may calculate the number of units for the room, rather than the entire facility.

C. Gravity Component Adjustments

1. Second and Subsequent Violations

Gravity components are adjusted based on whether the violation is a first, second, or subsequent (i.e., third, fourth, fifth, etc.) offense.[3] A "second" or "subsequent" violation should be determined to have occurred if, after being notified of a violation by the local agency, State or EPA at a prior demolition or renovation project, the owner or operator violates the Asbestos NESHAP regulations during another project, even if different provisions of the NESHAP are violated. This prior notification could range from simply an oral or written warning to the filing of a judicial enforcement action. Such prior notification of a violation is sufficient to trigger treatment of any future violations as second or subsequent violations; there is no need to have an admission or judicial determination of liability.

Violations should be treated as second or subsequent offenses only if the new violations occur at a different time and/or a different jobsite. Escalation of the penalty to the second or subsequent category should not occur within the context of a single demolition or renovation project unless the project is accomplished in distinct phases or is unusually long in duration. Escalation of the violation to the second or subsequent category is required, even if the first violation is deemed to be "minor".

A violation of a § 113(a) administrative order (AO) will generally be considered a "second violation" given the length of time usually taken before issuing an AO and should be assessed a separate penalty in accordance with the General Penalty Policy.

If the case involves multiple potential defendants and any one of them is involved in a second or subsequent offense, the penalty should be derived based on the second or subsequent offense. In such instance, the Government should try to get the prior-offending party to pay the extra penalties attributable to this factor. (See discussion below on apportionment of the penalty).

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[3] Continuing violations are treated differently than second or subsequent violations. See, Duration of Violation, below.

2. Duration of the Violation

The Region should enhance the gravity component of the penalty according to the chart (p. 17) to reflect the duration of the violation. Where the Region has evidence of the duration of a violation or can invoke the benefit of the presumption of continuing violation pursuant to Section 113(e)(2) of the Act, the gravity component of the penalty should be increased by the number of additional days of violation multiplied by the corresponding number on the chart.

In order for the presumption of continuing noncompliance to apply, the Act requires that the owner or operator has been notified of the violation by EPA or a state pollution control agency and that a prima facie showing can be made that the conduct or events giving rise to the violation are likely to have continued or recurred past the date of notice. When these requirements have been met, the length of violation should include the date of notice and each day thereafter until the violator establishes the date upon which continuous compliance was achieved.

When there is evidence of an ongoing violation and facts do not indicate when compliance was achieved, presume the longest period of noncompliance for which there is any credible evidence and calculate the duration of the violation based on that date. This period should include any violations which occurred prior to the notification date if there is evidence to support such violations. However, if the violations are based upon the statutory presumption of continuing violation, only those dates after notification may be included. When the presumption of continuing noncompliance can be invoked and there is no evidence of compliance, the date of completion of the demolition or renovation should be used as the date of compliance.(U.S. v. Tzavah Urban Renewal Corp., 696 F. Supp. 1013 (D.N.J. 1988))[4] Where there has been no compliance and the demolition or renovation activities are ongoing, the penalty should be calculated as of the date of the referral and revised upon a completion date or the date upon which correction of the violation occurs.

Successive violations exist at the same facility when there is evidence of violations on separate days, but no evidence (or presumption) that the violations were continuing during the

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[4] The court in Tzavah held that for purposes of asbestos NESHAP requirements, a demolition or renovation project has not been completed until the NESHAP has been complied with and all asbestos waste has been properly disposed. 696 F. Supp. at 1019.

intervening days. For example, where there has been more than one inspection and no evidence of a continuing violation, violations uncovered at each inspection should be calculated as separate successive violations. As discussed in Section C (1) above, successive violations occurring at a single demolition or renovation project will each be treated as first violations, unless they are initially treated as second or subsequent violations based upon a finding of prior violations at a different jobsite or because they warrant escalation based upon the fact that the current job is done in distinct phases or is unusually long in duration. The chart on page 16 reflects that additional days of violation for which there is inspection evidence are assessed the full substantive penalty amount while additional days based upon the presumption of continuing violation are assessed only ten percent of the substantive penalty per day.

Since asbestos projects are usually short-lived, any correction of substantive violations must be prompt to be effective. Therefore, EPA expects that work practice violations brought to the attention of an owner or operator will be corrected promptly, thus ending the presumption of continuing violation. This correction should not be a mitigating factor, rather this policy recognizes that the failure to promptly correct the environmental harm and the attendant human health risk implicitly increases the gravity of the violation. In particularly egregious cases the Region should consider enhancing the penalty based on the factors set forth in the General Penalty Policy.

3. Size of the Violator

An increase in the gravity component based upon the size of the violator's business should be calculated in accordance with the General Penalty Policy. Where there are multiple defendants, the Region has discretion to base the size of the violator calculation on any one or all of the defendants' assets. The Region may choose to use the size of the more culpable defendant if such determination is warranted by the facts of the case or it may choose to calculate each defendant's size separately and apportion this part of the penalty (see discussion of apportionment below).

II. ECONOMIC BENEFIT COMPONENT

This component is a measure of the economic benefit accruing to the operator (usually a contractor), the facility owner, or both, as a result of noncompliance with the asbestos regulations. Information on actual economic benefit should be used if available. It is difficult to determine actual economic benefit,

but a comparison of unsuccessful bids with the successful bid may provide an initial point of departure. A comparison of the operator's actual expenses with the contract price is another indicator. In the absence of reliable information regarding a defendant's actual expenses, the attached chart provides figures which may be used as a "rule of thumb" to determine the costs of stripping, removing, disposing of and handling asbestos in compliance with § 61.145(c) and §61.150. The figures are based on rough cost estimates of asbestos removal nationwide. If any portion of the job is done in compliance, the economic benefit should be based only on the asbestos improperly handled. It should be assumed, unless there is convincing evidence to the contrary, that all stripping, removal, disposal and handling was done improperly if such improper practices are observed by the inspector.

III. APPORTIONMENT OF THE PENALTY

This policy is intended to yield a minimum settlement penalty figure for the case as a whole. In many cases, more than one contractor and/or the facility owner will be named as defendants. In such instances, the Government should generally take the position of seeking a sum for the case as a whole, which the multiple defendants can allocate among themselves as they wish. On the other hand, if one party is particularly deserving of punishment so as to deter future violations, separate settlements may ensure that the offending party pays the appropriate penalty.

It is not necessary in applying this penalty policy to allocate the economic benefit to each of the parties precisely. The total benefit accruing to the parties should be used for this component. Depending on the circumstances, the economic benefit may actually be split among the parties in any combination. For example, if the contractor charges the owner fair market value for compliance with asbestos removal requirements and fails to comply, the contractor has derived an economic benefit and the owner has not. If the contractor underbids because it does not factor in compliance with asbestos requirements, the facility owner has realized the full amount of the financial savings. (In such an instance, the contractor may have also received a benefit which is harder to quantify - obtaining the contract by virtue of the low bid.)

There are circumstances in which the Government may try to influence apportionment of the penalty. For example, if one party is a second offender, the Government may try to assure that such party pays the portion of the penalty attributable to the second offense. If one party is known to have realized all or most of the economic benefit, that party may be asked to pay for

that amount. Other circumstances may arise in which one party appears more culpable than others. We realize, however, that it may be impractical to dictate allocation of the penalties in negotiating a settlement with multiple defendants. The Government should therefore adopt a single "bottom line" sum for the case and should not reject a settlement which meets the bottom line because of the way the amount is apportioned.

Apportionment of the penalty in a multi-defendant case may be required if one party is willing to settle and others are not. In such circumstances, the Government should take the position that if certain portions of the penalty are attributable to such party (such as economic benefit or second offense), that party should pay those amounts and a reasonable portion of the amounts not directly assigned to any single party. However, the Government should also be flexible enough to mitigate the penalty for cooperativeness in accordance with the General Penalty Policy. If a case is settled as to one defendant, a penalty not less than the balance of the settlement figure for the case as a whole should be sought from the remaining defendants. This remainder can be adjusted upward, in accordance with the general Civil Penalty Policy, if the circumstances warrant it. Of course, the case can also be litigated against the remaining defendants for the maximum attainable penalty. In order to assure that the full penalty amount can be collected from separate settlements, it is recommended that the litigation team use ABEL calculations, tax returns, audited financial statements and other reliable financial documents for all defendants prior to making settlement offers.

IV. OTHER CONSIDERATIONS

The policy seeks substantial penalties for substantive violations and repeat violations. Penalties should generally be sought for all violations which fit these categories. If a company knowingly violates the regulations, particularly if the violations are severe or the company has a prior history of violations, the Region should consider initiating a criminal enforcement action.

The best way to prevent future violations of notice and work practice requirements is to ensure that management procedures and training programs are in place to maintain compliance. Such injunctive relief, in the nature of environmental auditing and compliance certification or internal asbestos control programs, are desirable provisions to include in consent decrees settling asbestos violations.

V. EXAMPLES

Following are two examples of application of this policy[5].

Example 1 (This example illustrates calculations involving proof of continuing violations based on the inferences drawn from the evidence)

XYZ Associates hires America's Best Demolition Contractors to demolish a dilapidated abandoned building containing 1300 linear feet of pipe covered with friable asbestos, and 1600 square feet of siding and roofing sprayed with asbestos. Neither company notifies EPA or State officials prior to commencing demolition of the building on November 1. Tipped off by a citizen complaint, EPA inspects the site on November 5 and finds that the contractor has not been wetting the suspected asbestos removed from the building, in violation of 40 C.F.R. § 61.145(c)(3). In addition, the contractor has piled dry asbestos waste material on a plastic sheet in the work area pending its disposal, in violation of 40 C.F.R § 61.145(c)(6)(i). There is no evidence of any visible emissions from this pile. During the inspection, the site supervisor professes complete ignorance of asbestos NESHAP requirements. An employee tells the inspector that workers were never told the material on-site contained asbestos and states "since this job began we've just been scraping the pipe coverings off with our hammers." The inspector observes there is no water at the site. The inspector takes samples and sends them to an EPA approved lab which later confirms that the material is asbestos. Work is stopped until the next day when a water tank truck is brought to the facility for use in wetting during removal and storage.

On November 12 the inspector returns to the site only to find that the workers are dry stripping the siding and roofing because the water supply had been exhausted and the tank truck removed. A worker reports that the water supply had lasted four days before it ran out at the close of the November 9 work day. The inspector observes a new pile of dry asbestos containing debris in tall grass at the back of the property. Unlike the pile observed inside the facility during the first inspection, this pile is presumed to have produced visible emissions. At the time of the second inspection 75% of the asbestos had been removed from the building 50% of which is deemed to have been

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[5] The examples are intended to illustrate application of the civil penalty policy. For purposes of this policy, any criminal conduct that may be implied in the examples has been ignored. Of course, in appropriate cases, prosecution for criminal violations should be pursued through appropriate channels.

improperly removed[6]. After discussion with EPA officials, work is halted at the site and XYZ Associates hires another contractor to properly dispose of the asbestos wastes and to remove the remaining 25% of the asbestos in compliance with the asbestos NESHAP. The new contractor completes disposal of the illegal waste pile on November 18.

Neither XYZ Associates nor America's Best Demolition Contractors has ever been cited for asbestos violations by EPA or the State. Both companies have assets of approximately $5,000,000.00 and have sufficient resources to pay a substantial penalty.

The defendants committed the following violations: one violation of the notice provision (§ 61.145(b)(1)); one violation for failure to wet during stripping (§ 61.145(c)(3)) and failure to keep wet until disposal (§ 61.145(c)(6)(i)), each detected at the first inspection and lasting a duration of five days (Nov. 1-5); a second separate dry stripping violation (§ 61.145(c)(3)), observed at the second inspection and lasting for three days (Nov. 10-12); an improper disposal violation (§ 61.150(b)), discovered during the second inspection, lasting a duration of nine days (the violation began on November 10 and continued to November 18 per Tzavah) and a visible emissions violation (§61.150(a)) discovered during the second inspection, lasting a duration of seven days (Nov. 12-18). Thus, the defendants are liable for a statutory maximum of $750,000 (29 days of work practice violations x $25,000 (statutory maximum penalty per day of each separate substantive violation) + $25,000[7] for the notice violation = $750,000).

The penalty is computed as follows:

Gravity Component

Notice violation, § 61.145(b) (first time)	$15,000

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[6] America's Best completed 75% of the work over a 12 day period. For 4 of the 12 days (Nov.6-9) there is evidence that water was used and asbestos properly handled. Assume that equal amounts of asbestos were removed each day. Thus, 50% of the asbestos was properly removed (25% by America's Best, 25% by the new contractor.

[7] Arguably, for purposes of calculating the statutory maximum, the notice violation can be construed to have lasted at least until the EPA has actual notice of the demolition (or renovation, as the case may be).

-- First Inspection Violations

Violation of § 61.145(c)(3) (10 + 5 = 15 units of asbestos) (1 x $10,000)	$10,000	
Additional days of violation ($1,000 x 4 days of violations)	$ 4,000	
Violation of § 61.145(c)(6)(i) (1 x $10,000)	$10,000	
Additional days of violation ($1,000 x 4 days of violations)	$ 4,000	

-- Second Inspection Violations

New violation of § 61.145(c)(3) (1 x $10,000)	$10,000	
Additional days of violation ($1,000 x 2 days of violations)	$ 2,000	
Violation of §61.150(a) (1 x $10,000)	$10,000	
Additional days of violation ($1,000 x 6 days of violations)	$ 6,000	
Violation of § 61.150(b) (1 x $10,000)	$10,000	
Additional days of violation ($1,000 x 8 days of violations)	$ 8,000	
	$109,000	
-- Size of Violator (size of both defendants combined)	$20,000	
Total Gravity Component		$129,000

Economic Benefit Component

$20/sq. foot x 1600 sq. feet + $20/linear foot x 1300 linear feet	$32,000	
	+ 26,000	
	$58,000	

$58,000 x 50% (% of asbestos improperly handled)	$ 29,000
Preliminary Deterrence Amount	$158,000

Adjustment factors - No adjustment for prompt correction of environmental problem because that is what the defendant is supposed to do.

Minimum penalty settlement amount	$158,000

NOTE: If the statutory maximum had been smaller than this sum, then the minimum penalty would have to be adjusted accordingly. Also, for the dry stripping violations, no additional days were added for the period between the two inspections because there was no evidence that the dry stripping had continued in the interim period.

Example 2 (This example illustrates calculations involving proof of continuing violations based on the statutory inference drawn from the notice of violation)

Consolidated Conglomerates, Inc. hires Bert and Ernie's Trucking Company to demolish a building which contains 1,000 linear feet of friable asbestos on pipes. Neither party gives notice to EPA or to the state prior to commencement of demolition. An EPA inspector acting on a tip, visits the site on April 1, the first day of the building demolition. During the inspection he observes workers removing pipe coverings dry. Further inquiry reveals there is no water available on site. He also finds a large uncontained pile of what appears to be dry asbestos-containing waste material at the bottom of an embankment behind the building. He takes samples and issues an oral notice of violation citing to 40 C.F.R. §§ 61.145(c)(3) (dry removal), 61.145(c)(6)(i) (failure to keep wet until disposal), and 61.150(a) (visible emissions)[8], and gives the job supervisor a copy of the asbestos NESHAP. Test results confirm the samples contain a substantial percentage of asbestos.

On April 12, the inspector receives information from a ---

[8] Regardless of whether the inspector observes emissions of asbestos during a site inspection, where there is circumstantial evidence (such as uncontained, dry asbestos piles outside), that supports a conclusion that visible emissions were present, the Region has discretion to include this violation.

reliable source that the pile of dry asbestos debris has not been properly disposed of and there is still no access to water at the facility. This information supports a new violation of §61.150(b) (improper disposal). The inspector revisits the site on April 22 and determines that the waste pile has been removed. A representative of Consolidated Conglomerates, Inc. gives the inspector documents showing that actual work at the demolition site concluded on April 17, but the contractor cannot document when the debris pile was removed. Thus, there are at least 61 days of violation (17 days of dry removal in violation of § 61.145(c)(3) 22 days of failure to keep wet until disposal in violation of §61.145(c)(6)(i), 11 days of visible emissions in violation of §61.150(a) and 11 days of improper disposal in violation of § 61.150(b)) times $25,000 per day, plus $25,000 for the notice violation[9], or a statutory maximum of $1,550,000.

Consolidated Conglomerates is a corporation with assets of over $100 million and annual sales in excess of $10 million. Bert and Ernie's Trucking is a limited partnership of two brothers who own tow trucks and have less than $25,000 worth of business each year. This contract was for $50,000. Bert and Ernie's was once previously cited by the State Department of Environmental Quality for violations of asbestos regulations. As a result, all violations are deemed to be second violations.

The penalty is computed as follows:

Gravity Component

No notice (2nd violation)	$ 20,000
Violation of §61.145(c)(3) (approx. 3.85 units) (second violation)	$ 15,000
Additional days of violation (per presumption) (16 x $1,500)	$ 24,000
Violation of §61.145(c)(6)(i) (second violation)	$ 15,000
Additional days of violation (per presumption) (21 x $1,500)	$ 31,500
Violation of §61.150(a)	$ 15,000

[9] See footnote 3.

(second violation)

Additional days of violation (per presumption) (10 x $1,500)	$ 15,000
Violation of §61.150(b) (second violation)	$ 15,000
ional days of violation resumption) (10 x $1,500)	$ 15,000
	$180,500
Size of Violator (based Bert and Ernie's size only)	$ 2,000
otal Gravity Component	$182,500
Economic Benefit Component	
$20/linear foot x 1,000 linear feet	$ 20,000
Preliminary Deterrence Amount	$202,500
Adjustment factors - 10% increase for willfulness	$ 18,250
Minimum Settlement Penalty Amount	$220,750

NOTE: Since this example assumes there was a proper factual basis for invoking the statutory presumption of continuing noncompliance, the duration of the §61.150(a) visible emissions and § 61.150(b) disposal violation runs to April 21 and the § 61.145(c)(3) dry removal violation runs to April 17, the longest periods for which noncompliance can be presumed.

Apportionment of the Penalty

The calculation of the gravity component of the penalty in this case reflects a $5,000 increase in the notice penalty and a $48,500 increase in the penalty for substantive violations because it involves a second violation by the contractor. Ordinarily, the Government should try to get Bert and Ernie's to pay at least these additional penalty amounts. However, Consolidated Conglomerate's financial size compared to the contractor's may dictate that Consolidated pay most of the penalty.

Notification and Waste Shipment Record Violations

Notification Violations	1st Violation	2nd Violation	Subsequent
No notice	$15,000	$20,000	$25,000
No notice but probable substantive compliance	$ 5,000	$15,000	$25,000

Late, Incomplete or Inaccurate notice.

For each notice, select the single largest dollar figure that applies from the following table. These violations are assessed a one-time penalty except for waste shipment vehicle marking which should be assessed a penalty per day of shipment. Add the dollar figures for each notice or waste shipment violation:

Notice submitted after asbestos removal completed tantamount to no notice.	$15,000
Notice lacks both job location and asbestos removal starting and completion dates.	4,000
Notice submitted while asbestos removal is in progress.	2,000
Notice lacks either job location or asbestos removal starting and completion dates.	2,000
Failure to update notice when amount of asbestos changes by at least 20%	2,000
Failure to provide telephone and written notice when start date changes	2,000
Notice lacks either asbestos removal starting or completion dates, but not both.	1,000
Amount of asbestos in notice is missing, improperly dimensioned, or for multiple facilities.	500
Notice lacks any other required information.	200
Notice submitted late, but still prior to asbestos removal starting date.	200

Waste Shipment Violations

Failure to maintain records which precludes discovery of waste disposal activity	2,000
Failure to maintain records but other information regarding waste disposal available	1,000
Failure to mark waste transport vehicles during loading and unloading (assess for each day of shipment)	1,000

Work-practice, Emission and Other Violations

Gravity Component

Total amount of asbestos involved in the operation	First violation	Each add. day of violation	Second violation	Each add. day of violation	Subsequent violations	Each add. day of violation
≤ 10 units	$ 5,000	$ 500	$15,000	$ 1,500	$25,000	$ 2,500
> 10 units but ≤ 50 units	$10,000	$ 1,000	$20,000	$ 2,000	$25,000	$ 2,500
> 50 units	$15,000	$ 1,500	$25,000	$ 2,500	$25,000	$ 2,500

Unit = 260 linear feet, 160 square feet or 35 cubic feet - if more than one is involved, convert each amount to units and add together

Apply matrix separately to each violation of §61.145(a) and each sub-paragraph of § 61.145(c) and § 61.150, except §61.150(d) (waste shipment records) which is treated as a one time violation and § 61.150(c) (vehicle marking) (see chart on pages 15-16); calculate additional days of violation, when applicable, for each sub-paragraph - add together

Benefit Component

For asbestos on pipes or other facility components:

$20 per linear, square or cubic foot of asbestos for any substantive violation.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON **July 31, 2014, I** MAILED A TRUE COPY OF THE ATTACHED DOCUMENT BY **CERTIFIED MAIL-RETURN RECEIPT** REQUESTED, **ARTICLE NUMBERS 7005-3110-0000-5947-3146** POSTAGE PRE-PAID, UPON THE FOLLOWING PERSON(S):

Theodore Fiore, President
T. Fiore Demolition
411 Wilson Avenue
Newark, New Jersey 07105

Geraldo Villaran

Geraldo Villaran

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT ON **July 31, 2014, I** MAILED A TRUE COPY OF THE ATTACHED DOCUMENT BY **CERTIFIED MAIL-RETURN RECEIPT** REQUESTED, **ARTICLE NUMBERS 7005-3110-0000-5947-3139** POSTAGE PRE-PAID, UPON THE FOLLOWING PERSON(S):

Juan Carlos Bellu
Deputy Department Head
Township of Brick
401 Charles Bridge Road
Brick, New Jersey 08723

Geraldo Villaran

Geraldo Villaran